(24,670)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 431.

UNION PACIFIC RAILROAD COMPANY, APPELLANT,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO, ET AL.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term. 1914, of said Court, before the Honorable William C. Hook and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the seventeenth day of January, A. D. 1914, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Colorado, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Union Pacific Railroad Company is Appellant and The Board of County Commissioners of the County of Weld, State of Colorado, et al., are Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 Pleas in the District Court of the United States for the District of Colorado, Sitting at Denver.

Be It Remembered, that heretofore, and on, to-wit, the second day of August, A. D. 1913, came the Union Pacific Railroad Company by C. C. Dorsey, Esquire, and E. I. Thayer, Esquire, its solicitors, and filed in said court its bill of complaint; and sued out of and under the seal of said court a subpœna in chancery against The Board of County Commissioners of the County of Weld, state of Colorado, W. R. Patterson, as County Treasurer of said county, and S. J. McAfee, as Sheriff of said county.

And the said bill of complaint is in words and figures as follows, to-wit:

Bill of Complaint.

In the District Court of the United States for the District of Colorado.

In Equity. No. —.

UNION PACIFIC RAILROAD COMPANY, a Corporation, Complainant,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, State of Colorado; W. R. Patterson, as County Treasurer of said County, and S. J. McAfee, as Sheriff of said County, Respondents.

To the Honorable the Judge of the District Court of the United States sitting within and for the District of Colorado:

Your orator, Union Pacific Railroad Company, a corporation, duly organized and existing under and by virtue of the laws of the state of Utah, and a citizen and resident of said state, brings this its bill of complaint against the respondents, The board of County Commissioners of the County of Weld, in the state of Colorado, W. R. Patterson as Treasurer of said county of Weld, and S. J. McAfee as Sheriff of said county, all of whom are citizens and residents of the state of Colorado; and thereupon your orator complains and alleges:

First. That the amount in controversy in this suit, exclusive of interest and costs, exceeds the sum or value of three thousand dollars ($3,000.00); that your orator is a corporation duly organized
2 and existing under the laws of the state of Utah as a railway corporation, and by due compliance with all of the laws of the state of Colorado in reference thereto, authorized to do and doing business within said state, and was such at all the times with reference to which it is hereinafter mentioned, but that it is now and was all of said times, a citizen and resident of said state of Utah; that the county of Weld, in the state of Colorado, is a quasi-municipal corporation of said state, organized and existing under and by virtue of its laws under which its powers as a body politic and corporate are exercised by its board of county commissioners, and pursuant to which it is authorized to sue and to be sued under the name "The Board of County Commissioners of the county of Weld," and was such at all of the times with reference to which it is hereinafter mentioned, and that is is now and at all of said times was a citizen and resident of the state of Colorado; that the respondent W. R. Patterson is now and at all of the times with reference to which he is hereinafter mentioned was the duly elected, qualified and acting treasurer of said county of Weld, and a citizen and resident of the state of Colorado; that the respondent S. J. McAfee is now and at all of the times with reference to which he is hereinafter mentioned was the duly elected, qualified and acting sheriff of said county of Weld, and a citizen and resident of said state of Colorado; that your orator, under and by virtue of its charter from the state of Utah, and by virtue of its said full compliance with the laws of the state of Colorado, and other

states of the United States is empowered and authorized to own, maintain and operate lines of railway in the state of Colorado, and in other states and territories of the United States, and to own, hold and use property, real and personal, incident to the successful maintenance and operation of said lines of railway, and necessary, incident and convenient to the performance of its duties as a common carrier of freight and passengers in said state of Colorado and elsewhere; and that as such corporation your orator now holds, owns, maintains and controls, uses and operates a line of railway in various counties in the state of Colorado, and other property, real and personal, necessary and incident to the operation of its business as a railroad and common carrier of freight and passengers in said state.

Second. That among its other property your orator owns, maintains, possesses and operates lines of railway, segments of which in the county of Weld in the state of Colorado, are 198.23 miles in length, together with various station buildings and grounds, station furniture and equipment, telegraph instruments, coal, ties, rails, tracks, rolling stock, fences and railroad appliances and supplies of various sorts, all situate and being in said county of Weld, and all necessary and incident to and directly connected with its ownership, maintenance, use and operation of its said lines of railway with which it is engaged in the business of common carrier of passengers and freight for hire, both intra-state and inter-state: that said lines of railway in Weld county are as follows: Northern district, so-called, 73.71 miles in length, Julesburg branch, so called, 31.24 miles in length, Boulder branch, so-called, 13.69 miles in length, and Denver Northern line and Ft. Collins branch, 39.28 miles in length, branches east of Greeley, 40.31 miles, all of the total mileage of 198.23 miles as hereinabove stated. That all of said property of your orator in Weld county, as hereinabove described, is and was at all of the times hereinafter mentioned assessable for the purposes of taxation solely and exclusively by the State Tax Commission of the said state of Colorado, and not by the county assessor of the said county of Weld, or any other local, county or municipal officer whatsoever; that the principal office of your orator in the state of Colorado is and at all the times hereinafer mentioned has been situated in the city and county of Denver in said state, and that your orator has paid in full all taxes and assessments levied or assessed upon its property in said county of Weld up to and including the taxes assessed and levied for the year 1911 and payable in the year 1912, and has received from the successive county treasurers of said county receipts evidencing the full payment of such taxes.

Third. That the respondent W. R. Patterson, as county treasurer of said county of Weld, is intrusted and authorized and empowered under the statutes of the state of Colorado, and is authorized, directed and empowered by virtue of said statutes, in proper cases, to collect delinquent taxes by the seizure and sale of personal property owned by delinquent tax-payers; that the respondent S. J. McAfee, as sheriff of said county of Weld, is authorized, required and directed by said statutes of the state of Colorado, to execute and carry into effect, by seizure and sale of the property owned by delinquent taxpayers, such

distraint warrants, and other warrants, and process for the collection of said taxes as may come into his hands for that purpose.

Fourth. Your orator further avers that between the first day of March, A. D. 1912, and the last day of April, A. D. 1912, your orator, by and through its proper officers, furnished to the said state tax commission of the state of Colorado and filed with said commission a statement or return of all its property in said state of Colorado owned or controlled by it, and used or necessary to be used in the proper operation of its railroad and assessable by said state tax
4 commission, all as provided by and in full compliance with the statutes of the state of Colorado in such case made and provided; that in said statement and return your orator included all of its property in said county of Weld as hereinabove described and as it was by law required to do.

Fifth. Your orator further avers that under and by virtue of the constitution and statutes of Colorado it was and is at all of the times hereinafter mentioned the duty of the state tax commission to assess and value for purposes of taxation all of the property in said state owned or controlled by railroad companies, and used or necessary to be used for the proper maintenance and operation of the railroad business of said companies; that under and by virtue of said constitution and statutes it is and was at all of the times hereinafter mentioned the duty of the county assessor in each county of the state to assess and value for purposes of taxation all of the property situate in the county for which he was assessor, other than the property authorized and required to be assessed by the state tax commission; and that under and by virtue of said constitution and laws of the state of Colorado it is and was at all of the times hereinafter mentioned required that all property assessed either by the state tax commission or by the local county assessor should be assessed at its full cash value; and it was likewise at all of said times, and is now, provided and required, and particularly by section 3 of Article X of the constitution of the state of Colorado, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal.

Sixth. Your orator further avers that notwithstanding the provisions of the constitution and statutes of the state of Colorado, directing and requiring that all property be assessed for purposes of taxation at its full cash value, it has been for many years last past, including the period of time for which the assessments hereinafter complained of, including your orator's assessment for the year 1912, were made, the settled custom and practice, both of the state board of equalization (which formerly exercised the powers now exercised by the state tax commission), of the state tax commission, and of the various county assessors, including the said assessor of Weld county and his predecessors in office, to value and assess the property by them respectively assessable at less than the actual cash value thereof at the time of said assessment; that shortly subsequent to March 1, 1909, in recognition of this practice, and

for the purpose of securing uniformity in taxation, as re-
5 quired by the constitutional provision hereinabove referred to, said state board of equalization consulted with and called into conference all of the county assessors of the various counties in the state of Colorado, including the county assessor of said county of Weld, and it was then and there agreed and understood by and between the said state board of equalization and said various county assessors, including said assessor of the county of Weld, that all property in the state, both that assessable by the state board of equalization as well as that assessable by the various county assessors in their respective counties, should be valued and assessed at the rate of 33⅓ per cent. of the actual cash value of same at the time of the assessment; that in recognition of the settled custom and practice and the agreement and understanding hereinabove mentioned, and by general consent, the state board of equalization, acting upon and in pursuance of said custom, practice, understanding and agreement, proceeded to and did assess the railroad property of your orator, including that portion of the same situated within the county of Weld as hereinabove described, and having arrived at the full cash value of all the property of your orator within the state of Colorado in the manner and mode required by the statutes of said state, did thereupon take a proportion thereof, amounting to 33⅓ per cent. of the same, and the state tax commission exercising the powers formerly exercised by the state board of equalization, adopted said custom and practice, by and with the consent and understanding of the said local county assessors, and having arrived at the full cash value of all of the property of your orator within the state of Colorado in the manner and mode required by the statutes of said state, did thereupon, take a proportion thereof, amounting to 33⅓ per cent of the same, for and as the taxable value of said property of your orator within the state of Colorado for the year 1912, including said property within the county of Weld as aforesaid, and did thereupon, as by statute it was directed to do, apportion said value among the said counties of the state in accordance with the mileage of main track in each county, including said county of Weld; that the total valuation for purposes of assessment for the year 1912 of all of your orator's railroad property in the state of Colorado thus arrived at by the state tax commission was the sum of $7,688,130.00; that the mileage of your orator's main track in the state of Colorado, with reference to which said apportionment required by statute was made, was 583.20 miles; that the mileage of your orator's main track in the county of Weld, with reference to which said county's proportion of the total as-
sessed valuation was required to be and was computed, was
6 198.23 miles; that the apportionment per mile made by said tax commission of said total assessed valuation was $13,183.00, and that the total valuation certified to said county of Weld as its proportion of said assessed valuation, based upon the mileage in said county, was and is the sum of $2,613,250.00. Your orator further avers that said assessment of your orator's property by the state tax commission for the year 1912 was made, and the valu-

ation for the purpose of assessment and taxation was fixed upon a basis of not less than 33⅓ per cent. of the actual cash value of all of your orator's property in the state of Colorado, subject to assessment by said state tax commission, all as contemplated and agreed to be done by and between the said state board of equalization, state tax commission and the various assessors of the several counties of the state as hereinabove stated; and that said amount of $13,183.00 per mile for the mileage in Weld county, as certified to said county by said state tax commission as aforesaid, was not less than 33⅓ per cent. of the actual cash value of said property in Weld County at the date of said assessment. Your orator further avers that that proportion of the total valuation for assessment of your orator's property, so certified by the said state tax commission to the county of Weld, was by said county and the officers thereof duly accepted, as by statute provided, and extended upon the assessment and tax rolls of said county, and apportioned to the various school districts, cities and towns, in said county, the various state, county, school district, city and town levies applied thereto by said county and its officers, the same placed in the hands of the said county treasurer with warrant for the collection of the same, and the taxes arising therefrom are now due and payable as hereinafter more specifically alleged.

Seventh. Your orator further avers that notwithstanding the fact that all of your orator's property as aforesaid was assessed and valued for purposes of taxation at the rate of not less than 33⅓% of its actual cash value, and notwithstanding the arrangement, understanding and agreement to that effect theretofore entered into by and between said state board of equalization, state tax commission and the various county assessors of the state, including said county assessor of the county of Weld, wherein and whereby said county assessors, including said Weld county assessor, undertook and agreed to assess all property locally assessable by said respective county assessors, including the county assessor of Weld County, at the rate of not less than 33⅓% of its actual cash value, nevertheless the said county assessor of the county of Weld, with the sanction and approval of said county, the board of county commissioners thereof and the other officers of said county, failed and re-
7 fused to assess the property in said county within his jurisdiction at the rate of 33⅓ per cent of its actual cash value at the date of said assessment; but, on the contrary, deliberately, systematically and intentionally valued for the purposes of assessment and taxation such property in said county as he assessed at all at the rate of not to exceed 20 per cent. of its actual cash value, and failed, omitted and refused to assess at any value whatsoever, or at all, large amounts of property of various kinds, situate in said county and properly assessable and required by law to be assessed by said county assessor for said year 1912; that he wrongfully and illegally omitted to make any assessment whatsoever upon a great amount of real and personal property in said county, the existence and value of which was well known to said assessor, including clocks, watches, jewelry, gold and silver plate, diamonds and other precious

stones and like property, all of which in said county he assessed at a total valuation of $1,320.00 for clocks and watches, and $840.00 for other jewelry, gold and silver plate, diamonds and other precious stones and other like property, although, in truth and in fact, there were in said county in the year 1912, and properly assessable for taxation, clocks and watches of a value much greater than the value so assessed, and also jewelry, gold and silver plate, diamonds and other precious stones and other like property in said county subject to assessment and taxation for the year 1912, of very large value, the value and existence of which was well known to said assessor to be and was very great; and said assessor omitted to assess moneys, credits (except bank deposits), book accounts and other accounts not evidenced by writing, although there were then and there in said county, property subject to assessment and taxation, as was well known to said assessor, moneys, credits (except bank deposits), book accounts and other accounts not evidenced by writing, of very great value, and amounting, as your orator is informed and believes, to several hundred thousand dollars; and wrongfully and illegally wholly failed and omitted to make any assessment whatever upon notes, bonds, debentures and all other written evidences of indebtedness, although there were then and there in said county, properly subject to assessment and taxation, as was well known to said assessor, notes, bonds, debentures and other written evidence of indebtedness of very great value, and amounting, as your orator is informed and believes, to several hundred thousand dollars; and said assessor assessed and valued bank deposits in the state of Colorado at the average cash value thereof in the sum of $18,940.00,

8 and wrongfully and illegally wholly failed and omitted to make any assessment whatever upon the average cash value of bank deposits out of the state of Colorado held, owned and possessed by residents of the county of Weld and subject to assessment and taxation in said county, although there were owned, held and possessed by residents of the county of Weld bank deposits in the state of Colorado greatly in excess of said sum of $18,940.00, and although there were held, owned and possessed by residents of the county of Weld, and subject to taxation and assessment in said county, bank deposits out of the state of Colorado of great value, the existence and value of all of which said assessor well knew; and said assessor wrongfully and illegally wholly failed and omitted to make any assessment whatever upon the amount of capital employed in manufactures located in the county of Weld, although there was located and owned in said county of Weld a large amount of capital employed in manufactures, of great value and amounting, as your orator is informed and believes, to several hundred thousand dollars; and that said assessor wrongfully and illegally wholly failed and refused to make any assessment whatsoever upon the water rights or the rights to the use of water in connection with land for purpose of irrigation, or the added value of land arising from the ownership and use of water in connection therewith and appurtenant thereto for the irrigation of the same, although there existed and said assessor well knew that there existed in said county, subject

to assessment and taxation for the year 1912, property of the character last hereinabove described of immense value, the full cash value of which during said year 1912 was as your orator is informed and believes, and so charges, not less than the sum of $20,000,000.00, all of which was wholly omitted from assessment and bears no share of the burden of taxation in said county. That said assessor wrongfully and illegally wholly failed and omitted to make any assessment upon the intangible rights and assets owned by individuals and corporations in said county for the year 1912; that your orator further avers that in and by section 3 of Article X of the constitution of the state of Colorado, and likewise in and under the statutes of said state, it is provided that the personal property of every person being the head of a family, to the value of $200.00, shall be exempt from taxation, and that the said assessor wrongfully and illegally, but pretending to comply with said constitutional and statutory provisions, after having placed a value for assessment purposes upon the personal property returned by or found by him to be the property of one who was the head of a family, which valuation or assessment did not in any instance exceed one-fifth of the actual cash value of said property, did then and there deduct the
9 full sum of $200.00 as such exemption from said one-fifth valuation, or less, thereby allowing an exemption of not less than $1,000.00, instead of an exemption of $200.00 as contemplated, required and authorized by the constitution and statutes of the state of Colorado, and that such deductions were made by said assessor in the manner aforesaid in respect to the personal property assessment of every head of a family in said county of Weld, and of large numbers of other persons in said county who were not heads of families and not entitled to any exemption or deductions.

Eighth. Your orator avers that it cannot ascertain and is unable to state with exactness, the actual cash value of the real and personal property, the amount of money, credits, book accounts and other accounts, promissory notes, bonds and other written evidences of indebtedness, or the average cash value of deposits in banks within or without the state of Colorado, owned or held or possessed by the residents of the county of Weld, or of said water rights and rights to the use of water or of said intangible rights and assets, or of the other property wholly omitted from the assessment for the year 1912 as aforesaid, though subject to assessment and taxation for said year, nor can it ascertain or state with exactness the total amount of exemptions wrongfully or illegally allowed by said assessor as aforesaid, but your orator states that the actual cash value of said omitted property, and the actual amount of property wrongfully exempted as aforesaid, was very great, as was also the undervaluation of such property [*was*] was actually listed and assessed by said assessor, that said property so actually assessed was valued at not to exceed 20% of its actual cash value, whereas your orator's property was valued and assessed as aforesaid at not less than 33⅓ per cent of its actual cash value. And your orator further shows that the failure and omission of said assessor in said county to assess said property, and to place the same upon the assessment rolls, and to

subject the same to taxation, and the wrongful and illegal allowance of exemptions as aforesaid, and the pretended and illegal assessment and under-valuation of other property in said county as aforesaid, was not due to any error of judgment, made in good faith by said assessor, or any other officials of said county, as to any inability on his or their part to discover the existence or value of said property and taxable assets; but said omission and said allowance of exemptions, and said under-valuations, were deliberately and systematically made and done, and with the consent and connivance thereto of each and all the county officers of said county of Weld having anything to do with the assessment or equalization of taxes in said county, and particularly of the county commissioners of said county, and of the county board of equalization of said county, and for the purpose and with the intent of compelling your orator to pay a grossly high, unequal and disproportionate share of the taxes of said county, and with the purpose and intent that all taxpayers in said county of Weld, save and except such taxpayers as owned and held property in said county, assessable and assessed by said state tax commission, and particularly your orator, should escape the payment of an equal and just share of the state, county, municipal and school district taxes levied in said county. And your orator further avers that the acts and doings of said assessor and said county and the other officers thereof hereinabove complained of, in respect to the local assessment for the year 1912, were not and are not occasional and casual, but, on the contrary, the same course of procedure in respect to under-valuation, excessive, improper and illegal allowance of exemptions and wrongful, illegal and intentional omission of property from assessment has been consistently and continuously carried on in said county of Weld by said assessor and the other county officers and their various predecessors in office, for many years last past, systematically, deliberately and continuously, with the purpose and intent, and in past years with the result of placing upon your orator and others whose property was assessed by the state board of equalization and now is assessed by the state tax commission, an excessive, unjust and unequal burden of taxation, and of enabling owners of property in said county, assessable locally and not assessable by the state tax commission, to escape their just, fair and proper proportion of the burden of taxation.

Ninth. Your orator further avers that under the constitution and laws of the state of Colorado, and particularly under section 3 of article X of said constitution, providing that taxes shall be equal and uniform upon the same class of subjects within the territorial limits of the authority levying the tax, taxes could not and cannot be lawfully levied upon your orator's property in said county of Weld for the year 1912 upon an assessed valuation in excess of $7,909.80 per mile of railway in said county, instead of $13,183.00 per mile as the same is now apportioned to said county and extended upon the assessment and tax rolls thereof. And your orator further shows that the assessment made by the state tax commission as aforesaid, for the year 1912, including all of your orator's property above described, and also the said assessment made by the said county assessor as hereinabove described, has heretofore been extended upon the assess-

ment and tax rolls of said county of Weld, and levies for
11 the year 1912 on behalf of said state and county and the various school districts, cities and towns therein, through which the railway of your orator extended and extends, have been made and the taxes produced thereby, including said illegal and excessive tax upon your orator's said property, have been extended upon the tax rolls of said county for the year 1912 and a warrant to collect the said tax so extended has been delivered to and is now in the hands of said W. R. Patterson as treasurer of said county, who now holds said warrant and threatens and will proceed to enforce the collection of said taxes against your orator and its property.

Tenth. Your orator further shows that the total assessed valuation of all property in said county of Weld, including the property of your orator for the year 1912, was $20,438,710.00, of which the property of your orator in said county is assessed at $2,613,250.00, and other railroad property, telegraph, telephone and car lines and express company lines assessed by the said state tax commission was assessed at an aggregate value of $2,404,250.00, making a total value of the property in said county of Weld assessed by the state tax commission of $5,017,500.00; that the total assessed value of the property assessed by the county assessor of said county was $15,941,810.00, of which $520,600.00 was declared and stated by said county assessor to be upon personal property exempt by law from taxation as aforesaid, leaving a balance of $15,421,210.00 as the assessed valuation of all property in said county subject to taxation assessed by said assessor. And your orator alleges that the full cash value of the said property in said county assessed by said county assessor for the year 1912, was not in truth and in fact merely the sum aforesaid, but was at least five times said amount, and that the actual cash value of the property in said county which the said county assessor assessed as personal property exempt from taxation, and as such deducted from his total assessment, was not merely the sum heretofore stated, but was in truth and in fact at least five times said amount.

Eleventh. Your orator further avers that by reason of a systematic and intentional under-valuation and omission from assessment as aforesaid of the property assessable by the county assessor, the levies for county and school district and city and town purposes within said county of Weld were necessarily made high for the purpose of producing certain revenue for county, school, city and town purposes for the ensuing year, and that the application of said levies to the property locally assessed by the assessor in the manner, upon the basis and with the omissions aforesaid, and likewise upon the property of your orator within said county assessed and valued by
12 the state tax commission for the purposes of taxation, in the manner and upon the basis hereinbefore alleged, produced and produces a tax against your orator for county, school, city and town purposes greatly in excess of the fair and proper share of taxes which ought to be borne by your orator, considering the comparative full cash value of its property, and the other property in said county; that the taxes charged against your orator in said county for the year 1912 were and are grossly excessive and unequal as compared

to the tax levy on other property in said county, and that unless a court of equity will intervene your orator will be required to pay as state, county, school, city and town taxes within said county of Weld the sum of $77,818.41 to the county treasurer of said county of Weld which exceeds by at least $31,127.37 the amount of taxes for said purposes which your orator is legally and equitably bound to pay to said county treasurer and which is a tax based upon the said assessed valuation of your orator's property in said county, as found by the state tax commission. And in this behalf your orator alleges that at the rate at which other property was assessed in said county of Weld for taxation for the year 1912 the assessed valuation of your orator's property should not have exceeded $7,909.80 per mile, and that at said rate the total assessable value of the property of your orator in said county should not and did not exceed $1,567,950.00, and that the total taxes thereon for state, county, school, city and town purposes at the rate at which taxes were levied in said county for the year 1912 should not have exceeded, and could not lawfully exceed the sum of $46,691.04, which tax, your orator shows and alleges, was and is the total sum and amount of taxes for state, county, school, city and town purposes justly due and chargeable against your orator, or which could or can be levied against the property of your orator for the year 1912, conformable to the laws and constitution of the state of Colorado, or which could be levied against your orator or its property without denying your orator the equal protection of the laws, or without depriving your orator of its property without due process of law. And your orator further alleges that the said tax in the [ful-] sum of $46,691.04 for state, county, school, city and town purposes aforesaid, your orator is now and at all times has been ready and willing to pay to said county treasurer of Weld county; and your orator alleges that heretofore and on, to-wit, the 25th day of February, A. D. 1913, your orator duly tendered to said county treasurer of said county of Weld, at his office in said county, the sum of $23,345.54, for and on account of the first half of the entire taxes for said state, county, school, city and town purposes for the year 1912. Your orator further avers that thereafter
13 and on, to-wit, the 26th day of July, A. D. 1913, your orator duly tendered to said county treasurer of the county of Weld, at his office in said county, the further sum of $23,345.50, for and on account of the second half of the entire taxes for state, county, school, city and town purposes for the year 1912, which amount, as your orator avers, was and is the full amount of the balance due from your orator on account of said state, county, school, city and town taxes for the year 1912, but your orator avers that said tenders were made unconditional and the making of said tenders were then and there at the time of the making thereof duly acknowledged by said county treasurer, and the amounts so tendered were refused solely for the reason that the amounts tendered were less than the amounts shown by the treasurer's books to be due, and not for any other reason or upon any other ground whatsoever. And your orator alleges and shows that it has at all times kept said tender good, and is now and at all times — been ready and

willing to pay said money amounting to the sum of $46,691.04, and all thereof, to the county treasurer of said county, or to deposit the same into the registry of the court for the use of the said county treasurer of the county of Weld, and hereby offers so to do; and your orator further avers that all and singular the amount of said taxes assessed in excess of $46,691.04 is excessive, illegal and void, for the reasons hereinabove set forth, and that the collection of said excessive and unjust amount from your orator would operate as a denial to your orator of the equal protection of the laws, and would deprive your orator of its property without due process of law, contrary to the constitution of the state of Colorado and to the constitution of the United States in such case made and provided. And your orator alleges that it is a common carrier of freight and passengers and of the United States mails in the state of Colorado and elsewhere, and that all and singular its property located in or passing through the county of Weld, and which the county treasurer of said county or the sheriff thereof, could seize or levy upon for the collection of said illegal and wrongful tax, is essential and absolutely necessary to the proper and safe operation of your orator's railroad and the performance of its duties as a common carrier of freight and passengers and of the United States mails, and in carrying on its interstate as well as its intra-state business. And your orator alleges that any distraint or seizure of said property by said sheriff or county treasurer or other official in said county, would work irreparable damage to your orator, and would interfere with the proper and safe operation of its lines of railway.

14 Twelfth. Your orator further avers that the said respondent W. R. Patterson, as treasurer of said county of Weld, now threatens and gives out that unless your orator will pay to him as said county treasurer the full sum of $77,818.41, with such interest and penalties, if any, as may be due when said payment is made, he will forthwith, and without delay, proceed to collect the same and cause the personal property of your orator to be forthwith distrained, seized and sold, in order to make therefrom the said sum above mentioned; and in this regard your orator alleges, upon information and belief, that the said W. R. Patterson, as treasurer of said county, threatens to place, if he has not already placed, in the hands of the respondent S. J. McAfee as sheriff of said county, a certain distraint warrant against the property of your orator for the collection of said taxes so illegally and wrongfully levied against the property of your orator as aforesaid, with interest and penalties, if any, to the end that said distraint warrant may be forthwith executed by the said sheriff by the immediate seizure, distraint and sale of the cars, rolling stock and other personal property of your orator located in or passing through said county of Weld; and that the said sheriff now threatens and gives out that he will forthwith, and without delay, seize and distrain under said distraint warrant such cars, rolling stock and other personal property of your orator in said county, unless your orator shall promptly pay said excessive and illegal tax as aforesaid; and that the said respondents as the treasurer and sheriff respectively of said county of Weld will, unless restrained by this Honorable Court forthwith consummate said threats, and will seize,

distrain and sell the property of your orator located in or passing through said county of Weld, which as aforesaid, is essential and necessary to the operation of your orator's railway and the performance of its duties as a common carrier of freight and passengers and of the United States mails; and your orator alleges that such seizure, distraint and sale would and will seriously cripple, hamper and interfere with the operation of your orator's railroad and the running of trains thereon, and would and will interfere with the convenience and safety of the traveling public, and with the local and interstate commerce of your orator; and that such seizure and distraint or sale is liable to endanger the safety of persons and property in transit over your orator's said railroad; and will greatly injure and damage your orator's business, and that such damage will be irreparable and cannot be measured in money, and that your orator has no adequate remedy at law; that immediate and irreparable loss and damage will result to your orator unless the respondents are enjoined as
15 hereinafter prayed. And your orator further avers that should said excessive and illegal tax be collected from your orator or its property, or be paid by your orator, under protest or otherwise, your orator would have no full, complete or adequate remedy at law for the recovery of the moneys so collected or paid; that the moneys so paid or collected could never be fully recovered by your orator, and no part thereof could be recovered except by a multiplicity of suits, if at all; that the said moneys, if paid or collected, would immediately be distributed to said county of Weld and to the state and the various school districts, cities and towns in said county through which the lines of railway of your orator extend, and your orator avers that when said money is so distributed to said county and state, and to said various school districts, cities and towns, it can never be recovered by your orator; that there are not now and never have been and never will be any funds in the treasury of the county of Weld, or in the treasury of said respective school districts, cities and towns for the payment of judgments obtained against said county or said school districts, cities and towns, or any thereof, on account of taxes unlawfully collected or paid under protest; that the ordinary revenues of said county and said school districts, cities and towns are not now and never will be sufficient to satisfy any such judgments, and your orator is informed and believes, and upon information and belief alleges, that none of the officers of said county of Weld or said school districts, cities or towns, and none of their successors, will ever voluntarily levy a tax or set aside the ordinary revenues of said county for the purpose of paying or satisfying said judgments which your orator might recover for or on account of the collection or payment of said illegal taxes, or any part thereof; and if it ever succeeded in recovering any portion thereof it could only do so after extensive, long and vexatious litigation and multiplicity of suits.

Thirteenth. Your orator further avers that on or about the 24th day of August, A. D. 1912, your orator filed with the Honorable John F. Shafroth as Governor of the state of Colorado, and with the Colorado State Tax Commission, its certain petition and complaint, wherein and whereby your orator showed, inter alia, that it had

been wronged by the errors and erroneous assessment made by the local assessor in said county in respect to the uniformity of the assessment of the property of your orator therein; that the assessment of your orator's property therein, as made by the said state tax commission, was greatly excessive as compared with the assessment of the other property therein by the county assessor thereof;

16 that in and by said petition and complaint your orator asserted that the county assessor of said county had erroneously assessed the property of private individuals, as well as corporations, within his county at a value much lower than the cash value of said property and at a much less ratio than that upon which said tax commission had assessed the property of your orator therein; and in and by said petition and complaint your orator prayed that it be allowed to present evidence and arguments in support thereof, and that after the hearing of said petition and complaint the said board make such findings, rulings and orders as would place the assessment of your orator's property in said county upon an equality with the assessment of other property in said county assessed by the state tax commission and the county assessor thereof. That thereafter and on or about the 12th day of September, A. D. 1912, and on succeeding days, your orator, in response to notice from said state tax commission, appeared before said board and presented its evidence and arguments in support of said petition and complaint; and thereupon said state tax commission, being advised thereby and having received information from other sources concerning the under-valuation by said assessor of the property in his county, requested and ordered said county assessor (as said board had theretofore in writing specifically done) to increase his assessment of the property in said county to not less than thirty-three and one-third per cent of the actual cash value thereof, but the said county assessor, failed, neglected and refused to increase his assessment of the property in his county to not less than thirty-three and one-third per cent of the actual cash value thereof, or at all.

Your orator further avers that on or about the 5th day of October, A. D. 1912, your orator duly filed with the said State Tax Commission and the Colorado State Board of Equalization its certain verified petition and demand, in words and figures as follows :

Petition and Demand of Union Pacific Railroad Company.

To the Honorable the Colorado Tax Commission and the Honorable State Board of Equalization of the State of Colorado:

Your petitioner, Union Pacific Railroad Company, respectfully represents and shows:

1. That the total valuation for purposes of assessment for the year 1912, of all of your petitioner's railroad property in the State of Colorado, as fixed and determined by the State Tax Com-

17 mission, and the State Board of Equalization of the state of Colorado, is the sum of seven million, six hundred eighty-

eight thousand, one hundred thirty dollars ($7,688,130.00), which sum is not less than thirty-three and one-third per cent of the actual cash value thereof at the time of the assessment and the number of miles of your petitioner's main track in the state of Colorado is five hundred eighty-three and two tenths (583.2); that the number of miles of said main track in each county of the state of Colorado, through which the same extends, the rate or assessed value per mile thereof, and the distribution or apportionment of the total assessed value of $7,688,130, as aforesaid, to the said counties, in accordance with said main track mileage, are shown by the following table:

Union Pacific Railroad Assessment for Year 1912.

Counties.	Miles.	Rate.	Valuation.
*	*	*	*
Weld	198.23	$13,183	$2,613,250
*	*	*	*

2. Your petitioner shows that notwithstanding the fact that all your petitioner's railroad property in the state of Colorado, as aforesaid, has been assessed for the year 1912, for purposes of taxation at a rate of not less than thirty-three and one-third per cent (33⅓) of its actual cash value, the county assessors in various of said counties, though often requested to do so by your petitioner, have failed and refused to assess the property assessable locally and within their jurisdiction, in their respective counties, at a rate not less than 33 1/3% of the actual cash value of such property, but on the contrary, deliberately, systematically and intentionally have valued, for the purpose of taxation, such property at a rate of not to exceed twenty (20) per cent of its actual cash value, to-wit, the assessors of the respective counties set forth in the following tabulation have assessed the property in said counties within their jurisdiction at not to exceed the per cent of its cash value as set opposite the respective-named counties, to-wit:

County.	Per cent.
*	*
Weld	15.71
*	*

Your petitioner further shows that it has heretofore by its tax commissioner submitted certain documentary evidence con-
18 sisting of transcripts taken from the records of the assessor, treasurer and clerk and recorder of each and all of said counties, showing that the county assessors thereof have systematically and intentionally assessed the property in their respective counties at not to exceed the percentages of actual cash value thereof as hereinabove in this paragraph stated.

Wherefore, your petitioner prays and demands.

1. That the State Tax Commission shall require the assessors of said various counties to appear before it and shall examine each

of said assessors under oath concerning the said assessment in his county for the purpose of ascertaining whether such assessor has complied with the law in assessing the property in his county; and prays and demands that if necessary to secure their attendance that the said state tax commission shall issue process to bring such assessors before it and procure the service and execution of such process in the manner as required by law.

2. That the state tax commission shall determine whether the real and personal property in said several counties have been assessed at not less than one-third of the true and actual value thereof, and shall determine the increase in the valuation of each and all of said counties by such per cent or such amount as will place said property on the assessment rolls thereof at not less than one-third of its true and full cash value; and thereupon shall transmit to the State Board of Equalization a statement of the amount to be added to the valuation of the real and personal property in each and all of said counties, specifying the amount to be added to the valuation of the real and personal property therein, as required by law.

3. That the State Board of Equalization shall examine, adjust and equalize the assessments in said several counties of the state of Colorado; and

4. That the State Board of Equalization shall examine the abstracts of assessment as submitted by the State Tax Commission and shall forthwith examine the abstract of assessment of each county as submitted by the State Tax Commision, and make a record of its action on the abstract of each county and certify the same to the county assessor, requiring the county assessor to forthwith add to each tract or lot and its improvements, of real and all personal property in his county, the required per cent or amount on the valuation thereof as it stands after it has been equalized by the State Board of Equalization, as required by law.

UNION PACIFIC RAILROAD COMPANY, *Petitioner,*
By HUGHES & DORSEY,
E. I. THAYER,
Its Attorneys.

19 STATE OF COLORADO,
City and County of Denver, ss:

C. C. Dorsey, being first duly sworn, on oath deposes and says: That he is General Attorney for Colorado for Union Pacific Railroad Company, the petitioner above named; that said petitioner is a corporation and for that reason he makes this verification in its behalf; that he has read the above and foregoing petition and demand of Union Pacific Railroad Company and knows the contents thereof; that the statements and representations therein set forth are true to the best of his knowledge, information and belief.

C. C. DORSEY.

Subscribed and sworn to before me this 5th day of October, 1912.

[SEAL.] JAMES T. NAFF,
Notary Public.

My commission expires October 15, 1913.

Your orator alleges that the said state tax commission and the said State Board of Equalization wholly failed and omitted to grant the relief in said demand and petition prayed, or any thereof, and neglected and omitted to take any action whatever thereon requiring the county assessor of said county to raise or increase the assessed valuation of the property subject to his jurisdiction within said county, or to in any way equalize the assessment of property in said county assessed by said local assessor and the said state tax commission, as therein prayed.

Wherefore, your orator alleges that it has no full, complete or adequate remedy at law, and that full, complete and adequate relief can be obtained by your orator only by the granting to your orator of the relief in equity hereinafter specifically prayed:

Wherefore, inasmuch as your orator is remediless at law, and is entirely without remedy save and except by the assistance of a court of equity and its most gracious writ of injunction, your orator prays:

1. That there be issued out of and under the seal of this Honorable Court subpœnas in chancery, directed to said respondents, the Board of County Commissioners of the county of Weld, W. R. Patterson, as Treasurer of said county of Weld, and S. J. McAfee, as Sheriff of said county of Weld, all in the state of Colorado, in accordance with the practice of this Honorable Court, and that such respondents, and each of them, be required to appear
20 before this Honorable Court at a time and place therein to be mentioned, and full, true and perfect answer make (but not under oath, answer under oath being hereby expressly waived), to all and singular the allegations in this bill of complaint.

2. That in addition thereto a temporary injunction may issue out of and under the seal of this Honorable Court, directed to the said respondents, commanding and enjoining them, and each of them, their deputies, clerks, agents, attorneys, servants, representatives and employes, and all and singular the persons acting for or under them, or any of them, absolutely and wholly to desist and refrain from in any manner collecting or attempting to collect any tax or assessment against your orator or any of its property, levied or assessed, or pretended or claimed to have been levied or assessed, for the year 1912, in, for or by said county of Weld, and from in any manner seizing, distraining or selling, or attempting to seize, distrain or sell, or in any manner interfere with any property of your orator for or on account of any taxes claimed or pretended to be due or payable to the said county of Weld for the year 1912, said temporary injunction to remain in force until the final hearing, and that upon the final hearing said injunction be made perpetual.

3. That each and every portion of said alleged tax claimed to

be due, owing or payable to the said county of Weld or its treasurer for the year 1912, as aforesaid, over and above and in excess of the amounts heretofore paid or tendered by your orator, as hereinabove stated, be, upon the final hearing of this cause, ordered, adjudged and decreed to be absolutely void, and that all pretended interest and penalties on said taxes be likewise, upon the final hearing, ordered, adjudged and decreed to be absolutely null and void.

4. That your orator may have such other, further and different relief in the premises as to the court may seem meet and proper, and in accordance with equity and good conscience.

5. That your orator have judgment for its costs in this behalf laid out and expended.

UNION PACIFIC RAILROAD COMPANY,
By C. C. DORSEY,
E. I. THAYER,
Its Solicitors.

21 STATE AND DISTRICT OF COLORADO,
City and County of Denver, ss:

A. W. Scribner, being first duly sworn, on his oath, deposes and says: That he is the tax commissioner of the Union Pacific Railroad Company, the complainant above named, and makes this affidavit in its behalf; that affiant has read the above and foregoing bill of complaint and knows the contents thereof, and that the same is true to the best knowledge and belief of affiant.

A. W. SCRIBNER.

Subscribed and sworn to before me this 31 day of July, A. D. 1913.

[NOTARIAL SEAL.] WALTER E. WILMOT,
Notary Public.

My commission will expire October 31st, 1914.

Endorsed: Filed in the District Court on Aug. 2, 1913.

(*Subpœna in Chancery and Marshal's Return of Service.*)

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States for the District of Colorado, Sitting at Denver.

The President of the United States of America to the Board of County Commissioners of the county of Weld, State of Colorado; W. R. Patterson, as county treasurer of said county, and S. J. McAfee, as sheriff of said county, Greeting:

You and each of you are hereby commanded, that you appear before the Judge of the district court of the United States for the

district of Colorado, at the city and county of Denver, in said district, twenty days from the date hereof, to answer the bill of complaint of Union Pacific Railroad Company this day filed in the office of the clerk of said court, in said city and county of Denver, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default, and a decree had and entered accordingly.

To the Marshal of the district of Colorado to execute and make due return.

22 Witness, the Honorable Robert E. Lewis, Judge of the district court of the United States, for the district of Colorado, and the seal of the said district court, at the city and county of Denver aforesaid, this second day of August, in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the United States, the 138th year.

[Seal U. S. District Court.]

CHARLES W. BISHOP, *Clerk*,
By ALBERT TREGO, *Deputy Clerk*.

Memorandum.

The above named defendants are hereby notified that unless they and each of them shall file their answer or other defense in the office of the clerk of said court, at the city and county of Denver aforesaid, on or before the twentieth day after service, excluding the day thereof the bill of complaint may be taken pro confesso.

CHARLES W. BISHOP, *Clerk*,
By ALBERT TREGO, *Deputy Clerk*.

Marshal's Return.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I hereby certify that I have duly executed the within subpœna, as follows to-wit:

As to the Board of County Commissioners of the county of Weld, state of Colorado, by delivering a true copy hereof, together with a copy of the bill of complaint in this cause, to J. E. Snook, personally, as *to* the county clerk and recorder of said county and ex-officio clerk of the said Board of County Commissioners, at Greeley, in said district on the 2nd day of August, A. D. 1913.

As to W. R. Patterson, as County Treasurer of said county, by delivering a true copy hereof, together with a copy of the bill of complaint in this cause to him, personally, at Greeley, in said district on the 2nd day of August, A. D. 1913.

As to S. J. McAfee, as sheriff of said county, by delivering a true copy hereof, together with a copy of the bill of complaint in this

cause to Fred Williams, personally, as under-sheriff of said county, at Greeley, in said district on the 2nd day of August, A. D. 1913.

D. C. BAILEY, *U. S. Marshal,*
By E. B. CHADWICK, *Deputy.*

Endorsed: Filed in the District Court on Aug. 6, 1913.

23 (*Notice of Application for Preliminary Injunction and Marshal's Return of Service.*)

To the Respondents above named:

You and each of you are hereby notified that on Friday, the 8th day of August, A. D. 1913, at the hour of 10 o'clock a. m., or as soon thereafter as counsel can be heard, we shall apply for the issuance of a preliminary writ of injunction in the above entitled cause, according to the prayer of the bill of complaint, a copy of which is served upon you herewith, when and where you may attend if you think proper.

The said application will be made to the court at Denver, in the district of Colorado, upon the bill of complaint and affidavits at said time presented.

C. C. DORSEY,
E. I. THAYER,
Solicitors for Complainant.

UNITED STATES OF AMERICA,
District of Colorado, ss:

I hereby certify that I have duly executed the within notice, as follows to-wit:

As to the Board of County Commissioners of the county of Weld, state of Colorado, by delivering a true copy hereof, to J. E. Snook, personally, as the county clerk and recorder of said county and ex-officio clerk of the said Board of County Commissioners, at Greeley, in said district on the 2nd day of August, A. D. 1913.

As to W. R. Patterson, as County Treasurer of said county, by delivering a true copy hereof, to him, personally, at Greeley, in said district on the 2nd day of August, A. D. 1913.

As to S. J. McAfee, as sheriff of said county by delivering a true copy hereof, to Fred Williams, personally, as under-sheriff of said county, at Greeley, in said district on the 2nd day of August, A. D. 1913.

D. C. BAILEY, *U. S. Marshal,*
By E. B. CHADWICK, *Deputy.*

Endorsed: Filed in the District Court on Aug. 6, 1913.

(*Answer.*)

The Board of County Commissioners of Weld County, state of Colorado, W. R. Patterson, as county treasurer of Weld County, and S. J. McAfee, as sheriff of said county, for answer to the complaint, say:

24 First. Admit the allegations of paragraph first of said complaint.

Second. Admit the allegations of paragraph second of said complaint, save and except the allegation thereof that plaintiff has paid in full all taxes and assessments levied or assessed upon its property in Weld county to and including the taxes assessed for the year 1911, and payable in 1912, but on the contrary states the fact to be that the said complainant by refusing to pay the full amount of the taxes levied and assessed against it and by means of actions in court and otherwise has evaded the payment to said county of the full amount of taxes heretofore levied and assessed against its property and has by such refusal to pay taxes lawfully assessed against it, and by a systematic effort to evade the payment of its just portion of taxes levied and assessed upon its property in said county, *has* greatly embarrassed the said county and its taxing officers in the discharge of the public duties and functions by law upon them imposed, thereby coercing and compelling said county and its officers charged with the duty of collection of taxes upon the property thereof, in order to carry on the county government, into receiving and accepting less than the full amount of taxes lawfully levied and assessed upon the property of said complainant in said county.

Third. Admit the allegations of paragraph third of the complaint.

Fourth. Admit that complainant between March 1, 1912, and April 1, 1912, furnished to the State Tax Commission a return of its property in Colorado by complainant asserted to be under its control and used by it in the operation of its railroad; but upon information and belief, respondents deny that the papers, statements, and documents, so filed with said commission were or are in full compliance with the statutes of Colorado, or that in said statements and return complainant included all of its property in the county of Weld, as by law it was required to do, or that in said statement the said complainant stated the full cash value of the said property of said complainant in said state; but as respondent is informed and believes and upon information and belief states the fact to be, complainant in and by its said statement and return so filed with said State Tax Commission, in pretended compliance with the laws of Colorado, erroneously understated the amount, character and value of the property of said complainant in the state of Colorado, with the intent and for the purpose of securing in behalf of said complainant, an under-valuation and assessment of the property of complainant in the state of Colorado, and in said county of Weld, with the intent and for the purpose thereby of evad-

25 ing the payment to the state of Colorado, and particularly to the county of Weld, of its just and rightful portion of the

burden of taxation which should be paid and borne by the complainant.

Fifth. Admit the allegation of paragraph fifth of said complaint.

Sixth. Admit the allegations of paragraph sixth of the complaint concerning the valuation of property by the state board of equalization, the tax commission, and the county assessors of the various counties of Colorado; but deny that pursuant to the agreement and understanding in said paragraph of the complaint mentioned, or otherwise, or at all, the state board of equalization, of the state tax commission, proceeded to, or did, in the year 1912, or at all, pursuant to a custom, practice, understanding, agreement, or otherwise, assess the railroad property of complainant, including the part thereof situate in Weld County, as described in the complaint at an amount equal to 33⅓% of the valuation thereof, or assess the said property of complainant at any amount in excess of 19.8% of the actual value thereof.

Admit that the state tax commission exercising the powers formerly exercised by the state board of equalization, adopted the custom and practice formerly indulged, of assessing the property of complainant at less than the full cash value thereof, but deny that said tax commission in 1912, pursuant to said practice and custom or otherwise, or at all, did, in fixing the assessment of the property of complainant in Weld county, fix the amount equal to 33⅓% of the full cash value of the same, or that they did in assessing the said property of complainant in 1912 for taxation for taxes for 1912, assess the said property at any value in excess of 19.8% of the value of said property of complainant within the county of Weld.

Respondents admit that the portion of the total valuation for assessment of complainant's property was certified by the state tax commission to the county of Weld and was extended upon the tax rolls of said county and apportioned to the various school districts, cities and towns in said county, and the various state, county, school, district, city and town levies applied thereto by said county and its officers and the same was placed in the hands of the county treasurer with warrant for collection of taxes for the purpose of carrying on and discharging the duties imposed upon the said county and its officers of collecting the revenues necessary
26 and requisite to carrying on the county, state, and city governments; but deny that said county or its officers then did nor now do admit that the amount fixed and determined by the said state tax commission as the value of the property of complainant in the state of Colorado, or the county of Weld, was an amount equal to as much as 33⅓% of the [*case*] value of said property, or that it was any amount in excess of 19.8% of the cash value of the property of complainant in the county of Weld or state of Colorado.

Seventh. Deny that the county assessor of Weld county in assessing the property of said county in 1912 for the taxes of said year assessed the same at a value less than 33⅓% of the actual cash value thereof and deny that the county assessor of said county, or the board of county commissioners thereof, or any member of said

board, or any officer thereof, or at all, failed or refused to assess the property in said county within his jurisdiction at as much as 33⅓% of its actual cash value at the date of its said assessment; and deny that said assessor deliberately, intentionally, or otherwise, or at all, valued for the purpose of assessment and taxation the property of Weld County, in 1912, for the taxes of said year, at a rate of not to exceed 20% of its actual cash value, or at any rate less than 33⅓% of the actual cash value of the property of said county assessed by the said assessor; and deny that the said assessor failed, omitted, or refused, to assess, at any value or at all large amounts of property of various kinds, situate in said county, in said year, and properly assessable by the said assessor for the taxes of said year; and deny that said assessor wrongfully, illegally, or at all, omitted to make any assessment upon a great amount of real property located in Weld County in 1912, for the taxes of said year the value of which property was well known to the assessor, or at all omitted to assess such property, or any thereof.

Deny that said assessor wrongfully or illegally or otherwise, or at all, in making assessments of personal property in Weld County in 1912 for the taxes of said year of persons entitled by law to an exemption of $200, fixed and determined the value for assessment of the property of said persons, respectively, in the manner as in the complaint averred; and on the contrary the respondents aver the fact to be that the said assessor in making said assessments allowed the said exemptions only to persons by law entitled thereto, and that in so doing he deducted $200 from the full cash value of the property assessed to and against persons entitled to the said exemption and thereafter in each and every instance, he, the said assessor, did,

27 for the purpose of taxation, fix, determine, and assess, as the value of the property of the persons entitled to such exemptions, an amount equal to and not less than 33⅓% of the full cash value of the property of such persons, respectively, after the deduction of the exemption aforesaid.

And the respondents state the fact to be that the assessor of Weld county in making the assessment of the property of said county as required of him by law to be made in said year for the taxes thereof, in the discharge of his said duties, acted solely upon his own behalf as the assessor of said county and with out any agreement or understanding between, or collusion with him and the said county, the county treasurer, sheriff, board of county commissioners, or any member of said board, or any officer of the county of Weld; and in making said assessment the said assessor of Weld county was assisted by a large corps of deputies, not less than sixteen, with whom he made, in the manner provided by law, full and strict inquiry and effort to assess at a uniform valuation, all of the property of the said county subject to assessment in said year, after allowing the exemptions, exceptions, and deductions, required and provided by law, and that said assessor in said year, valued, assessed, and caused to be valued and assessed for the purposes aforesaid, all of the taxable property of said county required by him, by law, to be assessed at an amount of not less than 33⅓% of the actual cash value thereof; and

respondents upon information and belief state the fact to be that excepting errors and omissions necessarily attendant upon the assessment of so large an amount of property, as exists and is subject to assessment by the assessor of Weld County, therein, which were in fact of minor consequence, importance and amount, the said assessor in 1912 did assess and return in the manner provided by law all of the property of Weld County required to be assessed by the county assessor of Weld County for the taxes of said year, at an amount and value of not less in the aggregate than 33⅓% of the total cash value of all the property of said county subject to assessment and required by law to be assessed by the county assessor of said county in said year for the taxes thereof.

Respondents deny that the assessor of Weld county in 1912 in making assessment for the taxes of said year omitted to assess clocks, watches, jewelry, gold or silver-plate, or diamonds or other precious stones, which in said county in said year were subject to assessment, and on the contrary aver the fact to be that said assessor (admitting that many watches and clocks and other personal property were not assessed because claimed exempt under the exemption clause
28 of the Constitution of Colorado of $200) assessed all of the clocks, watches, jewelry, gold and silver-plated, diamonds, and other precious stones, subject to taxation in said county in said year for the taxes thereof.

Respondents deny that the assessor of Weld County in 1912 in making assessment for the taxes of said year omitted to assess money, credits, book accounts, or other accounts not evidenced by writing, bank accounts, notes, bonds, debentures, and other written evidence of indebtedness; and on the contrary aver the fact to be that said assessor (admitting that some of said property was not assessed because of the provisions of the statute in that behalf allowing deduction and offset on account of indebtedness of the person holding the said property, so subject to assessment) assessed all of the said moneys, credits, book accounts, and other accounts not evidenced by writing, bank accounts, bonds, debentures, and other written evidence of indebtedness subject to taxation in said county in said year for the taxes thereof.

Respondents deny that the assessor of Weld County in 1912 in making the assessment for the taxes of said year omitted to assess water rights or the right to the use of water in connection with the land for the purpose of irrigation, or the added value of land arising from the ownership and use of water in connection therewith and appurtenant thereto, for the irrigation of the same; but on the contrary aver the fact to be that said assessor (admitting that though water rights are not to be and are not separately taxed, they are to be taxed by the burden of taxation placed upon the land whereon the same are employed for irrigation) assessed all of the said water rights, and the rights to the use of water in connection with land, for the purpose of irrigation thereof, and the added value of land arising from the ownership and use of water in connection therewith and appurtenant thereto for the irrigation of the same. And respondents deny that there is or was in Weld county in 1912 water

rights of the aggregate value of 20,000,000, and [avers] the fact to be that the assessor made subject to the burden of taxation in the manner provided by law, all the water rights held and owned and existing in the county of Weld in the state of Colorado, in the year 1912, for the taxes of said year, in the manner and to the extent provided by law.

Respondents deny that the assessor of Weld county in 1912 in making assessments for the taxes in said year, omitted to assess capital employed in manufacture of great or any value, and aver
29 the fact to be that he assessed the property and capital engaged in manufacture in like manner as provided by law, and as he assessed all other property in the county for the said year.

Eighth. Deny the allegations of paragraph eighth of said complaint to effect that a large amount of the assessable property of Weld County in 1912 was omitted from assessment for said year and deny that the amount of property assessed in said Weld County by the assessor was assessed at a value of not to exceed 20% of its actual cash value and deny that complainant's property was valued and assessed at not less than 33⅓% of its actual cash value; but on the contrary aver the fact to be that all of the property of said county subject to assessment in said year by the assessor of said county for the taxes of said year, was then and there assessed at a value of not less than 33⅓%, whereas the property of respondent was valued and assessed as aforesaid at an amount of not to exceed 19.8% of its actual cash value.

Deny that any failure or omission of the assessor of Weld County, if any there was, which respondents deny, to assess any property in 1912, or to place the same upon the assessment roll and to subject the same to taxation was done or made deliberately or systematically, with the consent or connivance thereto, of each, all, or any of the county officers of Weld County, or that the same was done at all, for the purpose or with the intent of compelling complainant to pay a grossly high or unequal or disproportionate share of the taxes of said county, or done at all, or with any purpose or intent that the taxpayers of said county, except taxpayers who owned and held property in said county, assessable by the tax commission, and complainant should escape payment of an equal and just share of state, county, municipal, and school taxes levied in said county, and deny that any property in said county was by the assessor undervalued or exempted from taxation in said year for the purpose of casting an undue burden of taxation upon complainant or its stockholders or otherwise, or for any purpose, or at all, and deny that there was any deliberate, or systematic, or other wrongful conduct upon the part of the assessor of Weld County in 1912 in making assessments in said [years] for the taxes thereof with the connivance or consent of any officer of said county, or at all.

Deny all the allegations in paragraph eight to effect that there exists or has existed for a number of years last past an intention and purpose indulged in by said county, or the taxing officers of said county to undervalue the property of said county, legally as-
30 sessed, in order to cast an undue burden of taxation upon the respondent, or its stockholders, or to relieve from the

burdens of taxation other taxpayers of said county; but on the contrary respondents aver that the complainant for many years last past, and particularly in 1912, wrongfully, illegally, and intentionally made to the state board of equalization and unto the state tax commission, erroneous, untrue, and misleading statements as to the full cash value of the property of complainant in the state of Colorado, and in the county of Weld, subject to taxation for the purpose of misleading and misguiding the said state board of equalization and the said state tax commission in order thereby to secure an under-valuation and assessment of the property of complainant in the state of Colorado, and in the county of Weld, in order thereby to escape payment of the just portion of the burdens of taxation which rightfully should be borne and paid by complainant and in order thereby to cast upon the payers of taxes in said state and in the county of Weld whose property is locally assessed an undue and excessive portion of the burdens of taxation; and respondents have been informed and verily believe, and upon information and belief, state the fact to be, that in 1912, for the purpose and with the intent of securing an undervaluation of the property of complainant subject to taxation in said year for the taxes thereof in Weld County, the complainant by filing with the state tax commission of the state of Colorado, in said year, erroneous and misguiding statements concerning the cash value of the property of complainant in the county of Weld and in the state of Colorado, and otherwise, did deceive and mislead the said state tax commission and did thereby secure an undervaluation of the property of said complainant subject to taxation in the state of Colorado and in the county of Weld, and thereby the complainant's property, because of said wrongful and unlawful conduct of the complainant, was valued and assessed in the year 1912 for the taxes of said year by the said state tax commission at a value much less than the assessed value in said year of the other property in Weld County locally assessed, which value so erroneously fixed, determined, and under-assessed in 1912, by the state tax commission, as the property of complainant, subject to taxation in Weld County in said year, was erroneously fixed, determined and assessed at an amount not in excess of 19.8% of the full cash value thereof, whereby the complainant did and has cast upon the taxpayers of Weld County legally and rightfully assessed, an undue portion of the burdens of taxation in said county; and for the purpose of further escaping the burdens of taxation, which should rightfully be imposed upon the complainant in Weld County, Colorado, the complainant has refused to pay its taxes, justly and rightly due
31 for the year 1912, unless the county commissioners of Weld County, shall rebate to them a large part of the taxes levied and assessed for the year 1912 and justly due unto the county of Weld, for the purpose of carrying on the functions and duties of government of state, county, cities and towns, schools, and other purposes, which course of conduct upon the part of complainant, and its officers, is not based upon a belief upon the part of complainant and its officers that its property is assessed at more than the value thereof as required by law, or assessed at a greater portion of its value than is other property, subject to taxation in the state of Colorado, and in

the county of Weld, and not upon a belief that the said property is unduly burdened as compared with other property taxable in Weld County, with the burdens of taxation, but the said wrongful and unlawful practice, is a part of a course and policy of conduct, systematically pursued and indulged by complainant and its officers and agents, for the purpose of escaping payment of the just portion of the burdens of taxation which should rightfully attach to and be borne by complainant, and its property, as compared with other taxpayers and property legally assessed in Weld County.

Ninth. As to whether or not the computations as to valuation and assessment of property in Weld County recited in paragraph tenth of the complaint, are rightfully made, and the said conclusions are true in fact or approximately true, respondents have not and cannot obtain sufficient knowledge upon which to base a belief; but respondents deny that the full cash value of the property in said county, assessed by the assessor in 1912, was of a value equal to five times the amount and value of property which was assessed in said year by the assessor of said county, or that the property so assessed was of a cash value of more than three times the amount assessed and returned by the county assessor of said county in said year.

Tenth. Deny that because of any systematic, intentional, or other undervaluation or omission from assessment of property of Weld County assessable by the assessor, the levies for school, city and town, and other purposes, within said county, were necessarily, or at all, made high, for producing revenue for the year 1913, and deny that there was any tax produced or induced against complainant, or its property, for county, school, city, town or other purposes, in excess of the fair and proper share of tax, charged or to be borne by complainant, considering the full cash value of its property, as compared with the assessed cash value of the other property in said county. Deny that the tax charged against complainant in
32 Weld County for 1912 is grossly or at all excessive or unequal as compared with the tax levied upon other property in said county.

Admit that unless the county of Weld be prevented from collection thereof the complainant will be required to pay as the just taxes due to the county of Weld, including the tax due to the state of Colorado, and for schools, city and other purposes, which taxes, payable in 1912, and now due, amount to $77,818.41; but deny that said amount exceeds by $31,127.37, or in any amount exceeds the amount of taxes which complainant is legally and equitably bound and ought to pay to the county treasurer of Weld County for taxes for 1912.

Deny that at the rate other property was assessed in said county for taxation for the year 1912 complainant's property value should not have exceeded $7,909.80 per mile, and deny that the total amount of tax which the respondent should lawfully pay for the taxes of said year, is not in excess of $46,691.04; but upon the contrary aver that the amount of taxes which should be paid to the county of Weld, together with the penalties now due for taxes of 1912 is a sum greatly in excess of the sum of $77,818.41 and unless this payment in this amount be enforced, the evasion of its payment by complainant will entail upon other taxpayers of said county a denial of the

equal protection of the law, and will deprive them of property without due process of law.

Admit that complainant for the purpose of avoiding payment of its just portion of the burden of the taxes of Weld County for the year 1912, and in order to cast upon other taxpayers of the said county, an undue portion of the burden of taxation, tendered to the county treasurer of Weld County, Colorado, instead of the said sum of $77,818.41, justly due unto the said county in the manner aforesaid, the sums recited in paragraph eleventh of said complaint, to-wit: $23,345.54, and $23,345.50 amounting in the aggregate to $46,691.04; said county of Weld the sum of $77,818.41, due to said county, but deny that the complainant has ever offered to pay unto the — as the taxes upon its property located within said county and assessed in 1912, and respondents admit that the moneys so tendered were by the tax collecting officers of Weld County refused as they were in duty bound to do.

Deny that any of the tax amounting to $77,818.41 is illegal, unjust, or excessive, or that the payment thereof by respondent would operate as a denial to it of equal protection of the law, or would deprive it of its property without due process of law, contrary to the constitution of Colorado, or of the United States, or at all.

33 Eleventh. Admit that unless the complainant pays its justly assessed and levied taxes as aforesaid, the treasurer of Weld County and the sheriff thereof will take proper steps as by law enjoined upon them to enforce the payment of the moneys due from complainant as its just portion of the tax burdens due to Weld County; but deny that the payment by complainant of its just portion of tax will interfere with the operation of its public utility or [injury] or damage its business or that the same will produce any damage, irreparable to complainant, or at all, and deny that complainant has no adequate remedy at law; but respondents aver that the complainant has a plain, adequate, and speedy remedy at law, for the recovery of any illegal tax, paid by complainant, and avers that if complainant shall pay to the county of Weld the full sum of $77,818.41, as other taxpayers are required to do, and any of said sum paid shall be found to be illegal, the remedy at law afforded unto complainant for the recovery of any part thereof, is plain, adequate, and speedy, under the statutes of Colorado; and respondents aver that the county of Weld is solvent, ready and willing to pay at all times any judgment or judgments which may be obtained against it, for taxes illegally assessed, levied, or collected, or otherwise, and that its officers now are and always have been, ready and willing to levy any assessment necessary for the payment of any judgment or judgments which complainant or any person or corporation may procure against the said county.

Deny that if complainant shall pay unto the county of Weld the sum of $77,818.41, justly levied upon its property for taxes for 1912, together with the penalties now due thereon, that in case the said moneys or any thereof, be found to have been illegally assessed, against complainant, and its property (which is not admitted but denied) that the complainant will be caused a multiplicity of suits in order to recover back any moneys which may be found in said

payment to have been illegal or erroneous; but on the contrary aver that the provisions of the statutes of Colorado in that behalf, provide a full, plain, adequate, and speedy remedy at law for the recovery of any moneys illegally paid as taxes in that behalf.

Twelfth. Admit that about August 24, 1912, complainant filed the petition as set forth in paragraph thirteenth of the complaint and that the results thereof were practically as set forth in said paragraph of said complaint, but respondents deny that prior thereto, or at all, there had been any valuation of property in Weld County, other than as herein averred.

34 By virtue of the premises complainant ought to be compelled to pay unto the county of Weld its just portion of the tax levied and assessed upon the property of Weld County, to-wit: Not less than the sum of $77,818.41, and if so advised, take such action for relief from erroneous or illegal assessment, if any there be, as is provided by the statutes of the state of Colorado in that behalf.

Thirteenth. Respondents deny each and every allegation in the complaint contained, not herein specifically admitted.

Respondents further answering say:

That the bill of complaint herein fails to allege any matter or equity entitling the complainant to the relief prayed for therein, or to any relief, and particularly as follows:

(*a*) That the said complaint has not in and by said bill made or stated any such cause as doth or ought to entitle it to any such relief as is thereby sought and prayed for against these respondents, or any of them, or any relief whatsoever.

(*b*) That the said bill fails to show any irreparable injury threatened by the respondents, or any of them toward the complainant.

(*c*) That on the face of the bill of complaint it is shown that the complainant has a plain, adequate, and speedy remedy at law.

Wherefore respondents having fully answered all the matters in said bill material or necessary to be answered to their best knowledge and belief, humbly pray this Honorable Court to enter its judgment that these respondents be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained and for such other and further relief in the premises as to this Honorable Court may seem meet and in accordance with equity.

WALTER E. BLISS,
CHARLES F. TEW,
Solicitors for Respondents.

UNITED STATES OF AMERICA,
District of Colorado, ss:

W. R. Patterson, being first duly sworn, says:

That he is one of the respondents in the above entitled cause; that he has read the foregoing answer and knows the contents thereof; and that the same is true to the best of his knowledge and belief.

W. R. PATTERSON.

Sworn to before me and subscribed in my presence by the said W. R. Patterson, this 18th day of August, A. D. 1913. My commission expires 18th November, 1916.

[NOTARIAL SEAL.] HENRY C. LUTHER,
Notary Public in and for the County of Weld and State of Colorado.

Endorsed: Filed in the District Court on Aug. 19, 1913.

(*Petition of Complainant for Subpœna Duces Tecum.*)

Comes now the Union Pacific Railroad Company, plaintiff above named, and respectfully petitions the court for an order directing the issuance of a subpœna duces tecum addressed to A. L. Mumper, county assessor of said county of Weld, in the state of Colorado, directing said Mumper to appear in this court, at the trial of said cause, commencing on Wednesday, August 27th, 1913, and then and there bring, have with him and produce the following described documents, which are part of the records of said assessor's office:

(1) All schedules, both of real and of personal property, whether made by individuals, associations of persons or corporations, or by the assessor himself, or his representatives, relating to and upon which the assessment for the year 1912 in said county was based; and also all interrogatories and answers thereto; all claims of exemption; all statements of moneys, notes and credits, as well as all claims of indebtedness or debits upon which deductions were sought or obtained in respect of any moneys, notes and credits, or other wise, and which related to and formed the basis in whole or in part, of any assessment made in said county for the year 1912.

(2) The plat book used in said assessor's office in making the assessment of real estate for the year 1912, upon which are designated the schedules of property assessed.

Petitioner further represents and shows that the above mentioned documents are essential to the proof of the allegations set up in plaintiff's bill; that in and by said bill it is claimed and alleged that a large amount of property in Weld County was, by the County Assessor, under-valued for the year 1912, that a large amount of property escaped assessment entirely, that improper deductions were made and improper exemptions allowed, which facts appear from the documents hereinabove described and cannot otherwise be fully, accurately, clearly or in any satisfactory manner established.

C. C. DORSEY,
E. I. THAYER,
Solicitors for Plaintiff and Petitioner.

UNITED STATES OF AMERICA,
District of Colorado,
City and County of Denver, ss:

A. W. Scribner, being first duly sworn, on his oath, says: That he is Tax Commissioner of Union Pacific Railroad Company, the

above named petitioner and plaintiff; that he has read the foregoing petition and knows the contents thereof and that the same is true to the best knowledge and belief of affiant.

A. W. SCRIBNER.

Subscribed and sworn to before me this 25th day of August, A. D. 1913. My commission will expire October 31st, 1914.

[NOTARIAL SEAL.] WALTER E. WILMOT,
Notary Public.

Endorsed: Filed in the District Court on Aug. 26, 1913.

(*Order, Aug.* 26, 1913, *Denying Petition for Subpœna Duces Tecum.*)

Before Judge Lewis.

This cause comes on now to be heard on the petition of the plaintiff for a subpœna duces tecum upon one, A. L. Mumper, County Assessor of the County of Weld, in the State of Colorado, Clayton C. Dorsey, Esquire, appearing as solicitor for the plaintiff.

And thereupon, on consideration thereof, it is ordered by the court that the said petition be, and the same is hereby, denied.

(*Record of Entry of Hearing, Aug.* 27, 1913.)

Before Judge Lewis.

This cause comes on now to be heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire, appearing as solicitor for the plaintiff and Charles F. Tew, Esquire, appearing as solicitor for the defendants. And thereupon, comes the evidence the hearing of which is continued to the hour of adjournment.

(*Record Entry of Hearing, Aug.* 28, 1913; *Leave Granted to File Supplemental Bill of Complaint.*)

Before Judge Lewis.

37 This cause comes on now to be further heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire, appearing as solicitor for the plaintiff and Charles F. Tew, Esquire, appearing as solicitor for the defendants. And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

And thereupon, on motion of the plaintiff, it is ordered by the court that the plaintiff may file herein a supplemental bill of complaint, as it shall be advised.

(*Record Entry of Hearing, Aug.* 29, 1913.)

Before Judge Lewis.

This cause comes on now to be further heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire, appearing as solicitor for the defendants. And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

(*Record Entry of Hearing, Aug.* 30, 1913.)

Before Judge Lewis.

This cause comes on now to be further heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire, appearing as solicitor for the plaintiff and Charles F. Tew. Esquire, appearing as solicitor for the defendants. And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

Supplemental Bill of Complaint.

Now comes Union Pacific Railroad Company, plaintiff above named, and by leave of court first had and obtained, supplementing its bill of complaint heretofore filed herein, and in addition to the matters and things therein averred, alleges:

That since the commencement of this suit and the filing of said bill of complaint, pursuant to the suggestion of the court and in accordance with the agreement of counsel, plaintiff has paid to the county treasurer of said Weld County, and said county treasurer has received, the sum of money in and by said bill admitted by plaintiff to be due on account of taxes for the year 1912, and which has heretofore been tendered as in said bill stated; that said payment was made and received without prejudice to the claim of plaintiff that no more than said amount is properly payable, legally
38 collectible or lawfully due, and equally without prejudice to the claim of the defendants that the full amount claimed by them as and for the taxes for the year 1912 as stated in the bill is properly payable, legally collectible and lawfully due.

UNION PACIFIC RAILROAD COMPANY,
By C. C. DORSEY,
E. I. THAYER,
Its Solicitors.

STATE AND DISTRICT OF COLORADO,
City and County of Denver, ss:

A. W. Scribner, being first duly sworn, on his oath says:

That he is the Tax Commissioner of Union Pacific Railroad Company, plaintiff above named; that affiant has read the foregoing

supplemental complaint, and knows the contents thereof; and that the same is true to the best of the knowledge and belief of affiant.

A. W. SCRIBNER.

Subscribed and sworn to before me this 1st day of September, A. D. 1913.

[Seal U. S. District Court.]

CHARLES W. BISHOP, *Clerk*,
By ALBERT TREGO, *Deputy Clerk*,

Endorsed: Filed in the District Court on Sept. 1, 1913.

(*Affidavits for Complainant.*)

Affidavit of H. C. Fairall.

STATE OF COLORADO,
City and County of Denver, ss:

H. C. Fairall, of the city and county of Denver, state of Colorado, of lawful age, being first duly sworn, upon his oath deposes and says:

That he is Secretary of the State Board of Equalization of the State of Colorado; that he has in his office the records and minutes of the meeting of the Assessors of the State of Colorado held at the State Capitol, at Denver, Colorado, on the 25th day of May, A. D. 1909; that the attached "Exhibit A" to this affidavit is a correct copy of a part of the minutes of the meeting or convention of the State Assessors aforesaid, and contains all of the references in said minutes to the agreement between the Assessors of the state to assess the property in their respective counties at a valuation of thirty-three and one-third per cent. of the actual value;

39 [*The*] he has in his office the record of a report of a committee of county assessors filed in the office of the State Board of Equalization on the 15th day of July, 1909; that the attached "Exhibit B" to this affidavit is a correct copy of said report, and contains a favorable report upon the assessment by the State Board of Equalization upon the property owned by public service corporations of one-third the actual value thereof, and a recommendation that the county assessors of the state of Colorado fix their assessments upon a full one-third actual valuation, which recommendation he believes to have been considered in force by the State Board of Equalization during the year 1910.

That he has in his office, and has the custody of, the records and minutes of a meeting of the State Board of Equalization of the State of Colorado held at the State Capitol at Denver, Colorado, on the 3rd day of October, 1910; that the attached "Exhibit C" to this affidavit is a correct copy of a part of the minutes of said meeting and contains all of the references in said minutes to an instruction by said State Board of Equalization to the Assessor of Weld County to reconstruct his assessment in said county for the year 1910 and report to the state board at its meeting on October 17th, 1910.

That he has in his office a copy of a certain letter, dated October 7, 1910, which affiant, as Secretary of the State Board of Equalization, duly posted and mailed to A. R. Fischer, Assessor of Weld County, which letter relates to the assessment by said Assessor of the property in his county for the year 1910; that the attached "Exhibit D" to this affidavit is a true and correct copy of said letter.

That he has in his office, and has the custody of, the records and minutes of a meeting of the State Board of Equalization held at the State Capitol, at Denver, Colorado, on the 17th day of October, A. D. 1910; that the attached "Exhibit E" to this affidavit is a correct copy of a part of said minutes and contains all of the references in said minutes to a certain communication which the Secretary of said Board was directed to prepare and forward to the Assessor of Weld County, Colorado, instructing said Assessor to assess all property in his county at the standard of value agreed upon between the said Board and the assessors.

Affiant further says that he, as Secretary of said Board, prepared said communication and submitted the same to said Board for approval, and the same was approved and duly forwarded to the Assessor of Weld County, Colorado; that affiant has in his office a copy of said letter, a copy of which copy is hereto attached and
40 marked "Exhibit F." That he has had no information to show that the said Assessor did reconstruct his assessment, or in any manner comply with said order of the Board.

Affiant further says that for the year 1909 the state board of equalization, as shown by its records, assessed the property of Union Pacific Railroad Company in the state of Colorado subject to assessment by said Board at the sum of six million, seven hundred and eighty-five thousand, eight hundred dollars, being one-third the actual value thereof, as found by said board; that the state apportionment per mile for said year was fourteen thousand, two hundred and fifty-five dollars, and the apportionment to Weld County was 122.14 miles, at $14,255 per mile, or $1,741,100.

That for the year 1910 the State Board of Equalization assessed all the property of Union Pacific Railroad Company in the state of Colorado subject to assessment by said Board at the sum of seven million, three hundred and thirty-nine thousand, one hundred and eighty dollars, being one-third the actual value thereof, as found by said board; that the apportionment per mile in the state was fourteen thousand, eight hundred and seventy-two dollars, and the apportionment to Weld County for said year was 129.09 miles, at $14,872 per mile, or $1,860,330. That the increase of the assessment for 1910 over the year 1909 was principally due to increase in volume of property owned by Union Pacific Railroad Company in the state of Colorado subsequent to the assessment for the year 1909.

And further affiant saith not.

H. C. FAIRALL.

Subscribed and sworn to before me, this 7th day of September, A. D. 1911.

My commission expires December 21, 1912.

[NOTARIAL SEAL.] WILLIAM H. O'BRIEN,
Notary Public.

"EXHIBIT A."

Whereas, it has become apparent upon the examination and investigation made by this committee, that unless additional revenues are secured to the state, there will be no funds to meet many of the appropriations made by the last General Assembly, which appropriations are meritorious, and

Whereas, your committee further finds from its investiga-
41 tion that a number of the counties of the state are valuing property in the respective counties for assessment purposes at not less than forty per centum and that it is the opinion of the committee that a large number of the counties are valuing property upon a valuation much lower than this,

Whereas, your committee further finds in its opinion, from an examination of the estimated revenues of the state that the appropriations which are to be paid therefrom, can and will be paid if all the property of the state be assessed upon a uniform basis at not less than forty per cent of its actual value.

Therefore, we, your committee, do hereby recommend that a uniform standard of value for assessment purposes be established, both by the state board of equalization, and the assessors throughout the several counties of the state on a basis of not less than [forty]*† thirty-three and one-third per cent; that a committee of three be appointed by this Honorable Body, which shall remain a standing committee, whose duty shall be to sit in judgment upon the abstracts of assessment that shall be submitted to the state auditor in August to scrutinize said abstracts and to report again to this body and to the proper authorities, those counties and assessors which have failed to place their valuations in accordance with the uniform standard of value hereby recommended; that the state board of equalization be requested to cause a representative of its body to make a personal investigation among the several counties of the state as to the valuations made by the assessors therein to the end that the uniform standard of values heretofore recommended may be obtained.

That the said committee further confer with the state board of equalization concerning the valuation of property to be made by it and to scrutinize and examine the valuations so made and to be made by the State Board of Equalization and to report thereon to this body and to perform such other services as may be required of it.

All of which is respectfully submitted.

T. D. FOSTER.
W. T. KEOGH.
F. W. BRUSH.
F. F. SCREIBER.

[* Word enclosed in brackets erased in copy.]
† Amended to 33⅓%. See page 531.

The Board desires further to say, that should said report be adopted and its provisions fulfilled, it pledges itself to in every way endeavor to carry out the recommendations therein con-
42 tained, and it will do everything in its power to assist in bringing about the valuation of property throughout the state upon a uniform and equitable basis and according to the standard so recommended; that in the performance of its duties as a state board of equalization, to value the public service corporations of the state, it will adhere to said standard in the making of its valuations; that it will employ a representative of the board to make a personal examination of the property values throughout the several counties of the state for the purpose of ascertaining the relative values of the several classes of property that will be assessed for the current year by the various county assessors; that in the matter of the equalizing of taxes, as a board of equalization it will endeavor in every way to bring the values of the several counties up to the standard recommended, and will cause to be instituted such further and appropriate actions as may be necessary to secure and compel a valuation upon such basis.

To the end that the assessors of the several counties may be satisfied that the state board of equalization will comply with its statements herein contained, in the matter of valuations of the public service corporations of the state, and for the benefit and assistance of the board in making such valuations, the board requests this body, that it cause its committee, recommended to be appointed, to meet and confer with the state board in the matter of the valuations to be by it made, and to furnish to the board such information as may assist it in the proper performance of its duties.

Respectfully submitted,

JOHN F. SHAFROTH.
JOHN T. BARNETT.
ROADY KENEHAN.
W. J. GALLIGAN.
JAMES B. PEARCE.

Upon motion, the report of the Equalization Board was received and filed.

Motion that the report of the committee be received and adopted and that the committee be discharged with thanks, duly seconded.

Amendment to the motion that the report of the committee be amended to read 33⅓% instead of 40%.

Motion duly made and seconded that a vote be taken upon the motion to fix the rate of assessment at four o'clock p. m. Motion was carried.

43 The secretary then called the roll of counties.

Those in favor of 33⅓% voting Aye.

Those in favor 40% voting No.

The vote resulted Aye 24; No. 12;

The Chairman announced that the motion had been carried and the report had been amended to read 33⅓% instead of 40%.

Mr. Porter Plumb of Delta County moved to amend the assessors'

report by striking out that portion referring to the appointment of a permanent committee.

Mr. E. B. Field Jr. spoke against the [amendment].

The chairman, Mr. T. D. Foster, addressed the meeting in support of the report of the committee of assessors advocating the adoption of the forty per cent rate for assessing purposes and the appointment of the permanent committee and stated that in his opinion, the present rate of assessment in the state did not exceed twenty-two and one-half (22½%) per cent of a full valuation.

Motion duly made and seconded that a vote on the report be taken at four thirty o'clock p. m. Carried.

Governor Shafroth spoke against Mr. Plumb's amendment.

Mr. Plumb, then with the consent of his second withdrew his amendment.

The report of the assessors' committee as amended and the report of the state board of equalization were then adopted unanimously.

"EXHIBIT B."

To the State Board of Equalization, State of Colorado.

GENTLEMEN: We, the Committee of County Assessors, appointed by the County Assessors of the state of Colorado to sit with your Honorable Body in your determining the assessable valuation of the several public service corporations, desire to say that we have been favorably impressed with the care you have in each instance displayed in determining an assessable valuation and also with the intelligent and impartial methods you have employed in ar-
44 riving at the several valuations. The committee believe that the valuations you have fixed represent one-third of the actual value of the public service corporations of this state.

That equity in taxation may prevail in this state, we recommend that you urge upon the county assessors of Colorado the necessity of their fixing their assessments fairly upon a full one-third actual valuation and in each instance where it can be satisfactorily demonstrated that an assessor or assessors of this state fails to arrive at a full one-third of actual valuation that you exert every legal method to secure an assessment on this basis.

(Signed) T. D. FOSTER.
N. N. SMITH.

Attest:
A. R. FISCHER, *Secretary.*

I hereby certify that the above report was filed with the Colorado State Board of Equalization and the above report was signed on or about the fifteenth day of July, A. D. 1909.

H. C. FAIRALL, *Secretary.*

"EXHIBIT C."

Mr. L. K. Mulford, a taxpayer in Weld County, appeared before the Board and presented matters in reference to the assessment of his and other properties in Weld County.

Mr. A. R. Fischer, Assessor of Weld County, having been notified to be present at this meeting of the board, appeared and presented certain matters in reference to the assessment of Weld County.

After having made investigations of the testimony given on this assessment, the Board instructed the Assessor of Weld County to reconstruct the assessment in his county and report to the Board at their meeting October 17th, 1910.

"EXHIBIT D."

October 7, 1910.

Mr. A. R. Fischer, Assessor Weld County, Greeley, Colo.

DEAR SIR: The minutes of the meeting of the State Board of Equalization of October 3. show that the Assessor of Weld County was instructed to reconstruct his assessment and report to the Board at their meeting of October 17.

45 I am quite sure that in making the above order the Board did not intend that only those few instances that were cited as being so far below the standard of value, should be raised, which would be very unjust to those few taxpayers, but rather that all values that were assessed by you at below one-third the actual value should be raised up to the standard.

It was intended by the Board that you should assess All taxable property in your county at the agreed standard of value.

Very truly yours,

—— ——, *Secretary.*

"EXHIBIT E."

In reference to the assessments of the County Assessor of Weld County, it was ordered upon motion duly made and seconded, that the Secretary prepare a communication to be forwarded to the Assessor, stating the evidence that had been submitted to the Board in regard thereto, and instructing him to assess all property under his jurisdiction at the standard of value agreed upon between the Board and the Assessors: The Secretary was further instructed to submit the communication for approval before sending the same.

"EXHIBIT F."

October 18, 1910.

Mr. A. R. Fischer, Assessor Weld County, Greeley, Colo.

DEAR SIR: I am instructed by the State Board of Equalization to advise you that according to certain statements submitted to the Board, it appears that there have been discriminations made in the assessments between the taxpayers of Weld County and the Board desires to call to your attention the following properties, their reported values and the assessments for 1910 thereon;

	Property.	Sale value.	Assessment.
N. E. N. W.-E. ½ N. W. N. W.	20-1-66	$7,400	$1,100
S. E. S. W.-E. ½ S. W. S. W.	17-1-66	8,250	1,490
N. ½ S. W.	20-2-66	6,000	590
N. E.	21-2-66	5,000	530
S. W.	17-2-66	4,500	780
S. ½ S. E.	35-2-67	9,000	1,820
N. E.	28-1-66	5,000	480
E. ½ S. E.	62-1-66	2,400	400
N. ½ N. E.	9-1-66	4,900	320
N. W.	4-2-67	10,000	800
S. W.	4-2-67	10,000	1,350
E. ½ S. E.	29-2-66	8,500	1,530
N. ½	21-1-66	18,000	2,560
46 W. ½ N. E.	5-7-65	7,500	800
S. ½	3-8-65	10,000	980
W. ½	13-8-66	11,200	1,600
W. ½ N. E.	28-8-65	8,800	1,860
N. W.	35-8-66	16,000	2,400
N. W.	8-7-66	15,000	2,360
W. ½ N. W.	2-7-66	13,700	2,000
E. ½ S. W.	1-7-66	10,000	2,060
E. ½ N. W.	3-7-66	14,000	1,910
E. ½ N. W.	22-3-67	2,500	240
S. W.	5-2-66		
N. ½ N. W.	8-2-66	32,000	4,730
E. ½ S. E.	6-2-66		
S. W.	20-3-66	4,500	480
E. ½ N. E.	4-3-66	5,500	420
S. E.	25-4-68	15,000	2,010
N. W.	6-3-67	14,000	2,120
N. ½ N. W.-S. E. N. W.	11-4-66	3,250	360
N. E.	22-5-66	16,000	3,120
W. ½ N. E.	4-4-65	10,000	1,350
N. ½ S. E.	19-4-66	8,000	900
N. E. S. E.	7-4-66	5,500	240
E. ½ S. E.	16-4-66	8,000	1,160
S. E. S. W.	29-5-67	10,000	1,150
S. W.	15-4-67	15,000	1,180
N. W.	7-5-67	8,000	480
N. W.	6-4-68	22,000	2,640
N. W.	19-3-68	18,400	3,290
N. W.	5-1-68	12,800	2,100
N. E.	7-4-68	18,000	3,400
S. E. N. W.-S. W.	6-1-68	12,500	1,200
S. E. S. W.-S. W. S. E.	20-2-68	18,000	2,800
E. ½ N. W.-W. N. E.	29-2-68		

	Property.	Sale value.	Assessment.
N. W.	18-5-67	25,000	4,350
W. ½ N. E.	6-5-64	6,500	1,000
E. ½ S. E.	3-5-64	7,000	1,180
N. ½ S. W.	31-6-64	10,000	1,600
S. ½ S. E.	11-5-65		
N. E. N. E.	14-5-65	10,000	1,940
15 acres S. W. S. W.	12-5-65		
N. E. S. W.	16-5-65	8,000	1,000
N. E.	5-5-66	11,500	1,590
S. ½	17-6-64	34,394	5,400
N. E. N. E.	10-5-66	5,000	830
S. ½ S. E.	18-6-64	11,000	1,630
N. ½ N. W.	35-6-65	18,000	4,180
W. ½ S. E.	28-6-65	22,000	4,800
E. ½ E. ½ S. W.	34-6-65	8,500	1,730
S. ½ S. E.	23-5-65	14,000	2,100
W. ½ N. E.	30-6-65	23,000	4,400
E. ½ N. W.	21-6-65	21,000	3,800
E. ½ N. W.-W. ½ N. E.	21-6-65	38,000	7,100
S. ½ S. E.	35-6-65	17,000	2,870
N. E.	28-7-66	16,750	3,460
W. ½ S. W.	15-6-67	8,500	400
S. W.	13-6-67	15,000	4,000
N. W.	5-6-67	25,000	2,080

47 While the Board is of course desirous if having the property in your county assessed as per the agreement between the assessors and the board and expect you to assess it according to that agreement, the Board is desirous and insistent also that you omit no property from taxation altogether and that you do not wilfully undervalue certain other property in your county as it would appear from the testimony submitted to the Board in your presence has been the case. Such omissions and undervaluations result in discriminations between the taxpayers of your county and enable some of the taxpayers of your county to escape their just proportion of the burdens of maintaining county and state government, at the expense of other citizens of your county who do pay their just proportion.

You will therefore make the necessary corrections in your assessments so as to conform to the facts.

Very truly yours,

THE STATE BOARD OF EQUALIZATION,
Secretary.

Endorsed: Affidavit of H. C. Fairall, filed in the District Court on Sept. 1, 1913.

Supplemental Affidavit of H. C. Fairall.

STATE OF COLORADO,
City and County of Denver, ss:

H. C. Fairall, of lawful age, being first duly sworn, upon his oath deposes and says:

That he was during the years 1911 and 1912, and until the spring of the year 1913, and for some time prior to the year 1911 had been, secretary of the State Board of Equalization and Secretary to the Colorado State Tax Commission; that for the year 1911 the State Board of Equalization assessed all the property of the Union Pacific Railroad Company in the state of Colorado subject to assessment by said board at the sum of $7,688,130.00, being one-third of the actual value thereof as found by said board; that the apportionment per mile in the state was $13,775.00, and the apportionment to Weld county for said year of 1911 was 189.71 miles at $13,775.00 per mile, or $2,613,260.00; that the increase of the assessment for 1911 over the year 1910 was principally due to the acquisition and construction of new lines of railroad in said county, thereby increasing the mileage therein over the year 1910.

48 That for the year 1912 the State Tax Commission assessed all the property of Union Pacific Railroad Company in the state of Colorado subject to assessment by said Commission at the sum of $7,688,130.00, being one-third of the actual value thereof as found by said board; that the apportionment per mile in said state was $13,183.00, and the apportionment to Weld County for said year was 198.23 miles at $13,183.00 per mile, or $2,613,250.00.

Affiant further says that he, as secretary of the Colorado State Tax Commission, by and under the direction of said commission prepared and had printed a circular letter addressed to all the county assessors in the state of Colorado; that said circular letter was mailed at Denver, Colorado, to each county assessor, including the assessor for Weld County, Colorado, on or about the 1st day of June, A. D. 1912; that said circular letter read in part as follows:

While the commission was appointed on May 20, after part of the assessments of 1912 had been completed, it is nevertheless desired that you review your assessment with great care and make sure that no real or personal property subject to taxation is omitted, and also that all such property is assessed at the equitable valuation agreed upon between the State Board of Equalization and yourselves at the meeting three years ago, in order that the litigation which has characterized this and previous years may be avoided in the future;

That there was of record in the office of said State Tax Commission subsequent to the date said circulars were forwarded to the county assessors, as aforesaid, and during the time affiant was secretary thereof, and until his retirement as Secretary thereof in the spring of 1913, as hereinabove stated, and, as affiant is informed and believes, since that time has been and now is, a copy of said circular

letter, open to public inspection; that affiant has no information to show, nor is there any record in the office of the State Tax Commission to show, that the assessor of Weld County, Colorado, did assess the property in his county subject to his jurisdiction at the equitable valuation agreed upon between the State Board of Equalization and the assessors at the meeting held on May 25, 1909, as shown by affiant's former affidavit heretofore made in the above entitled cause.

Further affiant saith not.

H. C. FAIRALL.

Subscribed and sworn to before me this 8th day of August, A. D. 1913. My commission expires Nov. 16, 1914.

[NOTARIAL SEAL.] WILLIAM L. PALM,
Notary Public.

Endorsed: Filed in the District Court on Sept. 1, 1913.

49 *Affidavit of A. W. Scribner.*

STATE OF COLORADO,
City and County of Denver, ss:

A. W. Scribner, of the city of Omaha, county of Douglas and state of Nebraska, of lawful age, being first duly sworn, upon his oath deposes and says:

That he is now and has been for fifteen years last past the Tax Commissioner of Union Pacific Railroad Company; that he has inspected the tax records and rolls in the office of the county treasurer of the county of Weld, state of Colorado, for the purpose of obtaining the assessed valuation for the year 1912 of the property of Union Pacific Railroad Company in said county and such assessed valuation as apportioned to each school district, city and town in said county and the levies made by the state of Colorado, the county of Weld and the school districts, cities and towns in said county, respectively, upon the property of Union Pacific Railroad Company in each thereof and as extended upon the tax records and rolls of said treasurer of Weld County, Colorado; that affiant has prepared and attached hereto for incorporation herein as a part hereof a certain tabulation marked "Exhibit A;" that said "Exhibit A" shows in detail the valuation of the property of Union Pacific Railroad Company assessed for taxation purposes for the year 1912 in the state of Colorado distributed on a mileage basis to Weld County, Colorado, and the valuation distributed on a mileage basis to each school district, city and town in said county, the rate of the tax levy in mills levied respectively for said state, county, school districts, cities and towns, and the total taxes extended upon each of said valuations; that the total taxes levied upon the property of Union Pacific Railroad Company and claimed and shown by the records in the office of the treasurer of Weld County, Colorado, to be due and payable to the county treasurer of Weld County,

Colorado, for all of said purposes for the year 1912, is the sum of seventy-eight thousand, five hundred seventy-seven dollars and six cents ($78,577.06), as shown on said "Exhibit A" attached hereto; that taxes derived from certain school district levies and amounting to seven hundred fifty-eight dollars and sixty-five cents (758.65), as shown on said "Exhibit A" are conceded by the county treasurer of Weld County and the other assessing and taxing officials of Weld County to be illegal and no claim against Union Pacific Railroad Company or its property is made therefore; that said amount of illegal school district taxes has been deducted
50 from the total taxes of seventy-eight thousand, five hundred seventy-seven dollars and six cents ($78,577.06) assessed against the property of Union Pacific Railroad Company for the year 1912, leaving a balance of seventy-seven thousand, eight hundred eighteen dollars and forty-one cents ($77,818.41) as the amount claimed to be due and owing to the treasurer of Weld county, Colorado, as taxes lawfully assessed upon the property of Union Pacific Railroad Company therein for the year 1912, as shown on said "Exhibit A" attached hereto.

Further affiant saith not.

A. W. SCRIBNER.

Subscribed and sworn to before me this 7th day of August, A. D. 1913. My commission expires October 15, 1913.

[NOTARIAL SEAL.] JAMES T. NAFF,
Notary Public.

"EXHIBIT A."

State and political sub-divisions thereof.	Main track.	Valuation used by county in extending tax.	Rate of levy in mills.	Total taxes.
State }	198.23	$2,613,250	4 1/8	$10,598.18
County }			11 17/18	31,213.82
Lupton	.....	9,870	37	365.19
La Salle	.....	22,280	25	557.00
Platteville	.....	9,870	35	345.45
Evans	.....	19,770	31	612.87
Greeley	.....	35,590	20	711.80
Ault	.....	7,910	32	253.12
Eaton	.....	7,220	30	216.60
Nunn	.....	13,180	20	263.60
Kersey	.....	6,590	16	105.44
Erie	.....	3,290	21	69.09
Dacono	.....	6,590	25	164.75
Frederick	.....	6,590	15	98.85
Firestone	.....	6,590	0	.....
School Dist. No. 23	.....	53,390	9	480.51
8	.....	39,550	22	870.10
100	.....	32,960	5	164.80
31	.....	33,360	5	166.80
5	.....	54,050	14	756.70
35	.....	29,400	10	294.00
97	.....	36,650	23	842.95
29	.....	53,260	9	479.34
65	.....	108,630	19	2,063.98

State and political sub-divisions thereof.		Main track.	Valuation used by county in extending tax.	Rate of levy in mills.	Total taxes.
	15.....	.....	17,400	15	261.00
	20.....	.....	23,730	3	71.19
31	6.....	.....	45,610	24	1,094.64
	60.....	.....	33,620	12	403.44
	59.....	.....	25,570	9	230.13
	37.....	.....	61,300	25	1,532.50
	34.....	.....	34,540	17	587.18
	77.....	.....	22,280	4	89.12
	40.....	.....	65,910	22	1,450.02
	67.....	.....	61,690	18	1,110.42
	69.....	.....	72,640	15	1,089.60
	46.....	.....	165,010	14	2,310.14
	11.....	.....	42,310	15	634.65
	68.....	.....	20,300	8	162.40
	98.....	.....	33,350	25	833.75
	73.....	.....	54,310	10	543.10
	72.....	.....	56,420	14	789.88
	63.....	.....	22,800	12	273.60
	94.....	.....	39,800	12	477.60
	71.....	.....	105,460	16	1,687.36
	19.....	.....	18,320	7	128.24
	102.....	.....	27,280	17	463.76
	43.....	.....	109,940	5	549.70
	16.....	.....	79,890	19	1,517.91
	76.....	.....	54,150	18	972.90
	44.....	.....	26,360	7	184.52
	2.....	.....	74,870	1	74.87
	10.....	.....	54,310	5	271.55
	55.....	.....	1,710	6	10.26
	64.....	.....	52,730	13	685.49
	21.....	.....	85,160	8	681.28
	26.....	.....	2,110	12	25.32
	58.....	.....	30,980	7.5	232.35
	86.....	.....	69,210	12	830.52
	87.....	.....	46,270	17	786.59
	54.....	.....	106,910	2	213.82
	109.....	.....	71,840	11	790.24
	107.....	.....	34,410	16	550.56
	39.....	.....	29,130	4	116.52
	103.....	.....	47,200	17	802.40
	78.....	.....	52,600	10	526.00
	62.....	.....	39,940	13	519.22
	7.....	.....	52,730	6	316.38
					$78,577.06

Less excessive school district levies:

No. 8	Val'n $39,550,	2 mills.....	$79.10	
97	" 36,650,	5 "	$183.25	
40	" 65,910,	5 "	$329.55	
98	" 33,350,	5 "	$166.75	
				758.65
				$77,818.41

52 Endorsed: Affidavit of A. W. Scribner, Filed in the District Court on Sept. 1, 1913.

Affidavit of Frank A. Ayer.

STATE OF COLORADO,
City and County of Denver, ss:

Frank A. Ayer, of the city of Omaha, county of Douglas, and state of Nebraska, of lawful age, being first duly sworn, on his oath deposes and says:

That he is now and for several years last past has been Right of Way Agent for Union Pacific Railroad Company; that during said time, and particularly during the year- 1909 and 1910, he purchased right of way for Union Pacific Railroad Company through various farms and tracts of land in Weld County, Colorado; that as such right of way agent, and during said years, he purchased various portions of the right of way for certain lines of railroad owned by Union Pacific Railroad Company in Weld County, Colorado, to-wit: a certain line of railroad known as the Denver Northern line extending from a point on the southern boundary line of said county, near the southwesterly corner thereof, northerly and northwesterly through said county and into the county of Larimer, state of Colorado, and from a point on said line known as Dent, Colorado, northeasterly to the town of La Salle on the Denver Pacific line of Union Pacific Railroad Company; and certain lines of railroad known as the Crow Creek and Pleasant Valley lines of Union Pacific Railroad Company, extending from a point on the Denver Pacific line a few miles north of Greeley, Colorado, easterly and northeasterly into Weld County, Colorado; that affiant, in and about the purchase of said portions of said right of way, was required to and did go upon various lands adjoining and in the vicinity of said right of way, and affiant knows the valuation of several of said tracts of land; that a description of said tracts of land adjoining or in the vicinity of said right of way of Union Pacific Railroad Company and the values thereof, including the improvements, thereon, during the year, 1912, and at the time the assessment for the year 1912 was made, were as follows, to-wit:

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Description of land.				Value.	Assessed valuation, 1912.
Part of section.	Sec.	Twp.	Range.		
All	31	1 N.	67 W.	$31,750.00	$3,235
All	25	1 N.	68 W.	64,000.00	3,200
S. W. ¼	24	1 N.	68 W.	16,000.00	800
N. W. ¼	24	1 N.	68 W.	16,000.00	800
N. E. ¼	24	1 N.	68 W.	16,000.00	800
S. E. ¼	24	1 N.	68 W.	8,000.00	1,600
N. ½	13	1 N.	68 W.	24,000.00	1,600
S. ½	13	1 N.	68 W.	7,500.00	960
N. W. ¼ and S. ½	12	1 N.	68 W.	28,800.00	2,400
N. ½ N. E. ¼	12	1 N.	68 W.	6,000.00	760
S. ½ N. E. ¼	12	1 N.	68 W.	4,800.00	750
S. E. ¼	1	1 N.	68 W.	16,000.00	950
N. E. ¼	1	1 N.	68 W.	10,400.00	800
N. ½	18	2 N.	67 W.	32,000.00	1,470

Description of land.				Value.	Assessed valuation, 1912.
Part of section.	Sec.	Twp.	Range.		
All	7	2 N.	67 W.	32,000.00	5,000
S. W. ¼	6	2 N.	67 W.	11,020.00	1,571
N. W. ¼	6	2 N.	67 W.	12,000.00	2,400
N. E. ¼	13	2 N.	68 W.	20,000.00	1,830
S. E. ¼	13	2 N.	68 W.	12,800.00	1,760
W. ½	32	3 N.	67 W.	22,330.00	3,225
S. W. ¼ S. W. ¼	29	3 N.	67 W.	2,000.00	200
S. E. ¼	9	3 N.	67 W.	8,000.00	480
N. E. ¼	9	3 N.	67 W.	8,000.00	1,660
S. ½ N. W. ¼ and N. ½ S. W. ¼	10	3 N.	67 W.	12,000.00	1,040
S. E. ¼ S. E. ¼	4	3 N.	67 W.	3,000.00	120
N. ½ S. E. ¼ and S. W. ¼ S. E. ¼	4	3 N.	67 W.	9,000.00	2,160
N. E. ¼	4	3 N.	67 W.	12,000.00	2,430
W. ½ N. W. ¼	3	3 N.	67 W.	6,000.00	1,221
S. ½	24	4 N.	67 W.	16,000.00	1,240
N. E. ¼	13	4 N.	67 W.	15,840.00	2,451
S. E. ¼	13	4 N.	67 W.	10,980.00	1,360
W. ½	18	4 N.	66 W.	32,000.00	2,260
S. W. ¼	7	4 N.	66 W.	20,000.00	1,658
S. E. ¼	7	4 N.	66 W.	14,400.00	870
S. ½ N. E. ¼	7	4 N.	66 W.	8,000.00	676
S. E. ¼	2	4 N.	66 W.	16,000.00	1,360
S. ½ and S. E. ¼ N. E. ¼	1	4 N.	66 W.	32,400.00	2,980
N. ½ S. W. ¼	6	4 N.	65 W.	3,250.00	640
N. W. ¼	6	3 N.	66 W.	16,000.00	1,580
S. W. ¼	6	3 N.	66 W.	16,000.00	1,580
S. E. ¼	12	4 N.	67 W.	16,000.00	3,035
E. ½ S. W. ¼	12	4 N.	67 W.	7,100.00	1,503
W. ½ S. W. ¼	12	4 N.	67 W.	10,000.00	1,300
S. ½ N. W. ½	12	4 N.	67 W.	8,000.00	Not assessed
N. ½ N. W. ¼	12	4 N.	67 W.	7,200.00	1,200
S. E. ¼ and S. ½ S. W. ¼	2	4 N.	67 W.	34,200.00	4,400
N. ½ S. W. ¼	2	4 N.	67 W.	8,500.00	1,220
S. ½ N. W. ¼	2	4 N.	67 W.	8,000.00	1,175
E. ½ S. E. ¼-S. W. ¼ S. E. ¼ and S. E. ¼ S. W. ¼	3	4 N.	67 W.	23,550.00	3,296
54 N. E. ¼	19	5 N.	67 W.	17,875.00	3,355
N. W. ¼	5	5 N.	67 W.	20,000.00	4,120
N. E. ¼	5	5 N.	67 W.	20,000.00	3,900
S. W. ¼	19	6 N.	67 W.	14,800.00	1,190
W. ½ N. W. ¼	29	6 N.	65 W.	14,250.00	2,680
W. ½ S. W. ¼	29	6 N.	65 W.	14,750.00	2,560
E. ½ N. W. ¼ and N. W. ¼ N. E. ¼	29	6 N.	65 W.	28,750.00	6,050
E. ½ S. W. ¼	29	6 N.	65 W.	20,000.00	4,240
S. ½ N. E. ¼	29	6 N.	65 W.	17,500.00	3,300
N. W. ¼ S. E. ¼	29	6 N.	65 W.	10,000.00	1,660
S. W. ¼	28	6 N.	65 W.	40,000.00	7,300
N. W. ¼ and W. ½ N. E. ¼	28	6 N.	65 W.	54,000.00	9,730
E. ½ N. E. ¼	28	6 N.	65 W.	16,750.00	3,600
W. ½ S. W. ¼	27	6 N.	65 W.	18,000.00	3,200
W. ½ N. W. ¼	27	6 N.	65 W.	15,000.00	2,845
N. ½ S. E. ¼	29	6 N.	64 W.	8,750.00	1,726
S. ½ S. E. ¼	29	6 N.	64 W.	10,000.00	2,000
S. E. ¼	28	6 N.	64 W.	20,000.00	3,912
S. W. ¼	23	6 N.	64 W.	15,200.00	3,400
E. ½	23	6 N.	64 W.	16,000.00	2,900
N. W. ¼	17	6 N.	63 W.	4,000.00	474
Totals				$1,162,445.00	$155,205

Per cent of assessed valuation to actual value 13.25%.
And further affiant saith not.

FRANK A. AYER.

Subscribed and sworn to before me this 7th day of August, A. D. 1913.
My commission expires October 31, 1914.
[NOTARIAL SEAL.] WALTER E. WILMOT,
Notary Public.

Endorsed: Filed in the District Court on Sept. 1, 1913.

Affidavit of G. R. Gaylor.

STATE OF COLORADO,
City and County of Denver, ss:

G. R. Gaylor, of Pierce, County of Weld, State of Colorado, being first duly sworn, on his oath deposes and says:

That he is now and has been for five (5) years last past a dealer in real estate with offices in Pierce, Weld County, Colorado; that during the time above mentioned he has dealt in irrigated and non-irrigated lands in the county of Weld, buying and selling
55 the same, and is familiar with the irrigated and non-irrigated lands in the county of Weld, and particularly in the vicinity of Pierce, and of the values thereof.

Affiant further says that he personally had knowledge and is fully advised in regard to the sale of the following described lands during the three years last past; that said lands and the prices at which the same were sold are as follows:

				Value.	Assessed valuation, 1912.
East half of northwest quarter....	S. 3	Tp. 7	R. 66	$14,000.00	$1,910
East half of southwest quarter....	S. 1	Tp. 7	R. 66	10,000.00	2,034
Southeast quarter.....	S. 6	Tp. 7	R. 65	20,000.00	3,970
All of.....	S. 25	Tp. 8	R. 67	11,250.00	1,920
Northwest quarter.....	S. 35	Tp. 8	R. 66	16,000.00	2,550
Northeast quarter.....	S. 32	Tp. 8	R. 66	5,000.00	580
East half southeast quarter.....	S. 24	Tp. 8	R. 66	2,850.00	375
North half.....	S. 23	Tp. 8	R. 66	12,800.00	1,600
Southeast quarter.....	S. 23	Tp. 8	R. 66	9,000.00	760
All of.....	S. 19	Tp. 8	R. 66	8,824.00	2,340
Northwest quarter.....	S. 14	Tp. 8	R. 66	5,000.00	900
West half northeast quarter.....	S. 28	Tp. 8	R. 65	8,800.00	1,940
South half southeast quarter.....	S. 21	Tp. 8	R. 65	3,500.00	1,400
All of.....	Secs. 15 & 23	Tp. 8	R. 65	45,000.00	5,350
West half southwest quarter.....	S. 10	Tp. 8	R. 65	3,200.00	400
Southwest quarter.....	S. 8	Tp. 8	R. 65	8,000.00	2,245
Southeast quarter.....	S. 6	Tp. 8	R. 65	5,600.00	930
Southeast quarter.....	S. 31	Tp. 9	R. 65	4,000.00	320
Southwest quarter.....	S. 28	Tp. 8	R. 66	5,600.00	2,070
All of.....	S. 27	Tp. 6	R. 63	5,120.00	1,280
East half northeast quarter.....	S. 5	Tp. 7	R. 65	4,750.00	1,700
Northwest quarter.....	S. 28	Tp. 8	R. 66	7,600.00	2,020
West half northwest quarter.....	S. 2	Tp. 7	R. 66	13,700.00	2,160
All of.....	S. 31	Tp. 8	R. 66	14,200.00	1,920
West half southwest quarter.....	S. 34	Tp. 8	R. 66	6,100.00	850

That affiant knows that the considerations shown in recorded deeds thereof were bona fide considerations and represent the actual prices at which said lands were sold.

Affiant further says that he had for sale during the year 1912, and is familiar with the location and value of, the following described lands; that it is his opinion and belief, based upon experience derived in the real estate business, that the values of said lands in the spring of 1912 were as follows:

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North half southeast quarter.....	S. 20	Tp. 8	R. 66	$2,800.00	240
West half.....	S. 13	Tp. 8	R. 66	11,200.00	960
West half southwest quarter.....	S. 32	Tp. 8	R. 65	9,500.00	1,732
All of.....	S. 9	Tp. 8	R. 65	20,200.00	3,520
South half.....	S. 3	Tp. 8	R. 65	9,600.00	1,177
South half.....	S. 29	Tp. 9	R. 67	3,200.00	1,030
North half.....	S. 29	Tp. 9	R. 67	3,200.00	1,180
All of.....	S. 31	Tp. 9	R. 66	16,000.00	1,280
All of.....	S. 19	Tp. 9	R. 64	5,120.00	1,280
Northeast quarter.....	S. 20	Tp. 8	R. 66	4,800.00	480
Totals.....				$335,514.00	$56,403

Per cent 16.81%.

Further affiant saith not.

G. R. GAYLOR.

Subscribed and sworn to before me this 6th day of August, A. D. 1913.

My commission expires October 15, 1913.

[NOTARIAL SEAL.] JAMES T. NAFF,
Notary Public.

Endorsed: Filed in the District Court on Sept. 1, 1913.

Affidavit of Harry T. Proctor.

STATE OF COLORADO,
County of Weld, ss:

Harry T. Proctor, of Grover, County of Weld, state of Colorado, being first duly sworn, on his oath deposes and says:

That he is now and has been for six years last past a dealer in real estate, with offices at Grover, Weld County, Colorado; that during the time above mentioned he has dealt in irrigated and non-irrigated lands in the county of Weld, buying and selling the same, and is familiar with the values thereof, particularly irrigated and non-irrigated lands in the vicinity of Grover, Colorado; that the patented non-irrigated lands in townships 9, 10, 11 and 12 north of ranges 61, 62 and 63 west of the 6th principal meridian, had in the spring of the year 1912, and at the time — the assessment thereof, a minimum value of approximately $8.00 per acre and a maximum value of approximately $15.00 per acre, or an average

value of approximately $10.00 per acre; that the patented lands subject to irrigation by means of pumping plants in Townships numbered 10 and 11 north of ranges 61 and 62 west, had in the spring of 1912, and at the time of the assessment thereof, a mini-
57 mum value of $20.00 per acre and a maximum value of $30.00 per acre, with an average value of approximately $25.00 per acre.

Affiant further says that he has had listed with him, or with the firm of Wilson Proctor Realty Company, of which he is a member, as an agent or agents to sell during the year 1912, and at the time the assessment for the year 1912 was made, and since said time has had and now has, certain lands in Weld County, with the list prices thereof, as shown on a certain exhibit, attached hereto and marked Exhibit A.

Affiant further says that the value of each of said tracts of land hereinabove specifically described, during the spring of 1912, and at the time the assessment for the year 1912 was made, was the sum or in excess of the sum hereinabove respectively stated as the list price thereof.

Affiant further says that he personally had knowledge of and was and is fully advised as to the actual consideration which passed at the sale and conveyance of each of the tracts of land hereinafter specifically described, and knows that the considerations shown in the recorded deeds thereof were bona fide and represented the actual and true value at which said lands were sold, and represented, as affiant believes, the true and actual value thereof during the spring of the year 1912 and at the time the assessment thereof for the year 1912 was made; that said lands and the considerations which passed at the sales thereof, and the dates of said instruments, or the dates the same were filed for record, are as shown on a certain exhibit, marked Exhibit B, attached hereto and made a part hereof.

And further affiant saith not.

H. T. PROCTOR.

Subscribed and sworn to before me this 7th day of August, A. D. 1913.

My commission expires Feb. 10th, 1915.

[NOTARIAL SEAL.] HARRY B. WILSON,
Notary Public.

58 "EXHIBIT A."

Value.	Assessed valuation, 1912.	Subdivision.	Section.	Township.	Range.	Acres.	Value per acre.
14,400	470	E. ½	27	11 N.	62	320	$45
	not assessed	All	36	11	62	640	30
32,000	2,020	All	25	11	62	640	50
11,520	640	All	21	11	62	640	18
4,000	160	S. W. ¼	12	10	62	160	25
7,040	520	N. W. ¼ & S. W. ¼	8	9	61	320	22
4,000	210	S. E. ¼	31	10	61	160	25
2,800	160	N. W. ¼	31	11	61	160	18
8,160	800	N. ½ & S. W. ¼	35	11	61	480	17
7,680	1,280	All	25	11	61	640	12
	not assessed	S. W. ¼	12	11	61	160	14
2,720	210	N. E. ¼	20	10	61	160	17
2,400	210	N. W. ¼	15	9	61	160	15
2,720	210	N. W. ¼	34	10	61	160	17
1,920	160	N. W. ¼	11	10	61	160	12
3,200	310	N. E. ¼	13	11	63	160	20
2,560	320	S. E. ¼ / S. E. ¼	35 / 27	12	60	320	8
3,200	400	E. ½	13	11	60	320	10
2,080	210	S. E. ¼	23	8	60	160	13
1,280	160	N. E. ¼	5	10	60	160	8
2,720	210	N. E. ¼	19	9	60	160	17
	not assessed	N. W. ¼	29	9	60	160	18
4,800	480	N. E. ¼ / N. ½	26 / 27	8	60	480	10
4,160	160	N. W. ¼	20	8	60	320	13
	not assessed	S. ½	20	12	59	320	8
1,600	160	S. W. ¼	27	7	58	160	10
1,920	160	N. E. ¼	28	8	57	160	12
1,920	160	N. W. ¼	31	8	56	160	12
2,000	160	S. W. ¼	17	7	57	160	12.50
3,200	640	N. E. ¼ & N. W. ¼	17	7	56	320	10
$141,080	$10,580						

"EXHIBIT B."

Date sold.	Subdivision.	Sec.	Township.	Range.	Acres.	Consideration.	Assessed valuation, 1912.
Dec. 1912.	All	11	11	63	640	8960	1,280
Dec. 1911.	E. ½	17	12	62	320	4000	In Wyoming
Nov. 12, 1912.	All	27	11	61	640	3880	640
Nov. 15, 1912.	N. ½	17	7	56	320	4000	640
Dec. 16, 1912.	N. W. ¼	31	10	60	160	3200	160
Jan. 10, 1912.	W. ½	6	9	61	133	1400	not assessed
Dec. 25, 1912.	S. E. ¼	32	11	62	160	1920	210

Endorsed: Filed in the District Court on Sept. 1, 1913.

59 *Affidavit of Arthur H. Scribner.*

STATE OF COLORADO,
City and County of Denver, ss:

Arthur H. Scribner, of the city of Omaha, county of Douglas and state of Nebraska, of lawful age, upon his oath deposes and says: That he is now and has been for six years last past, traveling tax agent and special agent for the tax department of Union Pacific Railroad Company, with offices at Omaha, Nebraska; that he has made a special investigation into the assessment of real and personal property in the county of Weld, state of Colorado, for the taxes for the year 1912, and if all records in the offices of the assessor and treasurer of Weld County pertaining thereto; that he has investigated the records in the office of the clerk and recorder of the county of Weld, state of Colorado, for the purpose of obtaining information material to such assessment; that he has made a list taken from the records of the said clerk and recorder of said county of Weld, showing all sales of land in said county from the 1st day of September, 1910, up to and including the 1st day of June, 1913, with the exception that he has excluded from said list sales or transactions in which the consideration was apparently fictitiously stated, such transactions involving trades or transactions other than bona fide sales; that he has compared said sales as to consideration paid in such transactions with the assessed valuation of the same lands for taxes for the year 1912, and he has placed on said list under proper headings description of the lands by section, township, range acreage, date of sale, the book and page of the record, and the consideration paid therefor, and opposite such consideration he has placed the assessed valuation for the year 1912; that said list is marked "Exhibit A" and is attached hereto for incorporation herein to be read as a part hereof; that from said list it appears that the average ratio of assessed valuation of said lands to the sales value of said lands is fourteen and 88/100 per cent. (14.88%); that during the entire period covered by said list many transactions are recorded showing a failure to recite the full consideration in the deed, such deeds reciting a consideration of one dollar or other fictitious amount, or reciting love and affection as the consideration; that such sales and all other sales the record of which shows a fictitious consideration have been omitted from said list; that in stating the assessed valuation in said list of said sales such assessed valuation includes the assessed value of said lands and the assessed value of the improvement thereon.

60 Affiant further states that from the investigation of such records and the assessments of lands and improvements affiant was unable to find that the assessor of Weld County had included in his assessment roll for the year 1912 any assessment of water rights and rights to the use of water and intangible property rights in said county.

Affiant further states that the data appearing on "Exhibit A" hereto attached are correctly transcribed by him from the records

of said county of Weld, Colorado, as aforesaid. Affiant further states that he has inspected "Exhibit A" attached to the affidavit of George G. Holcomb in the above entitled cause, showing the sale values of all lands sold in Weld County, Colorado, between the 1st day of January, 1909, and the 23d day of August, 1910, as therein referred to; that he has obtained from the records in the offices of the assessor and treasurer of the county of Weld, state of Colorado, the assessments of each and all of said lands for the year 1912; that after the sales value of each thereof as indicated on said "Exhibit A" attached to said affidavit of George G. Holcomb, affiant has placed the assessed value thereof for the year 1912; that the aggregate assessed value of all the lands described in said "Exhibit A" attached to said Holcomb's affidavit sold between the dates aforesaid, as described in said affidavit, is the sum of six hundred and fifty-one thousand three hundred fifty-one dollars ($651,351.00); that from a comparison between the aggregate sales value of the lands described on said "Exhibit A," amounting to four million, four thousand, eight hundred sixty-seven dollars ($4,004,867.00), and the aggregate assessed value, as aforesaid, it appears that the average ratio of assessed valuation of said lands to the sales value of said lands is sixteen and 26/100 per cent (16.26%); that the average percentage of assessed value for the year 1912 to the sales value for the entire period between January 1, 1909, and June 1, 1913, as shown by Exhibit A attached hereto and Exhibit A attached to said Holcomb's affidavit is fifteen and 62/100 per cent (15.62%).

And further affiant saith not.

ARTHUR H. SCRIBNER.

Subscribed and sworn to before me this 8th day of August, A. D. 1913.

My commission expires October 31, 1914.

[NOTARIAL SEAL.] WALTER E. WILMOT,
Notary Public.

Exhibit A.

Statement showing transfers of lands in Weld County, Colorado, filed for record between September 1, 1910 and June 6, 1913, and the assessed valuation of the same parcels for the year 1912.

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Deed	Record B. P.	Considera-tion	Assessed Val. 1912
N½ SE	18	5	66	80	9/3/10	330-507	$ 1,000	$ 400
N½ SW	21							
NE NW	28	3	67	108	5/27/09	330-519	5,940	900
W½ NW	18	5	66	80	9/5/10	330-530	6,000	940
W½	17	10	64	320	8/1/10	330-533	6,400	320
NE NW	4	9	63	40	9/13/10	330-567	800	40
NE NW&NW NE & E½ SE NW	17	2	68	100	9/22/10	330-577	10,000	720
SE SE	12	5	65	40	9/23/10	337- 3	6,500	740
E½ NE	19	2	66	75	1/19/10	337- 12	4,350	985
SW	15	11	63	160	1/5/09	337- 29	1,920	160
E½ NW	23	2	63	80	10/4/10	337- 41	1,600	160
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NE SE	5	4	65	40	9/14/10	337- 46	5,000	$ 750
N½ NE	16	2	68	80	10/3/10	337- 64	8,850	1,060
NW NE	7	5	67	40	9/10/10	337- 87	4,000	600
NE	9	7	63	160	10/8/10	337-104	4,000	480
S½ SW	6	4	65	80	10/21/10	337-108	10,000	891
E½ SE	8	2	66	80	10/19/10	337-113	8,000	1,240
S; SE	18	8	65	80	10/17/10	337-114	3,200	240
NE	23	11	63	160	10/14/10	337-122	3,120	160
S½ NW	3	7	65	80	10/10/10	337-127	7,500	1,800
NE	23	11	62	160	8/18/09	337-130	3,500	310
NW NE	32	2	66	40	10/8/10	337-131	6,500	950
N½	25	1	65	320	10/12/10	337-136	11,200	960
SE	30	7	65	160	10/17/10	337-144	24,000	3,800
NE	31	6	64	160	10/21/10	337-145	16,000	2,450
N½ S½ NE	35	1	67	40	11/2/10	337-152	2,300	375
SE	31	10	61	160	10/17/10	337-154	4,000	210
N½ N½ NE & N½ NE NW	18	2	66	60	11/7/10	337-165	6,000	910
S½ SE & E½ SW	7	2	66	160	11/7/10	337-166	9,500	2,065
N½ NW	23	1	67	80	9/22/10	337-172	9,500	1,800
NW & W½ NE	8	3	67	240	11/11/09	337-179	20,000	4,596
NE	10	1	62	160	11/19/10	337-215	2,800	420
NW	14	2	65	160	11/22/10	337-221	7,625	480
E½ SE	20	6	66	80	11/5/10	337-222	12,000	2,100
N½ NE & SW NE N½ NW&NW SE SW	28	4	68	240	11/19/10	337-230	18,000	2,840
All	21							
NW	29	11	30	960	5/10/10	337-236	7,360	960
S½ NW	11	10	61	80	11/29/10	337-241	7,000	1,800
S½ SW	34	8	65	80	11/8/10	337-244	13,500	2,150
SW	7	5	64	160	12/1/10	337-245	1,280	180

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Record Deed	B. P.	Considera- tion	Assessed Val. 1912
E½	33	11	65	320	12/1/10	337-246	2,560	320
NE	34	7	64	160	12/1/10	337-248	3,500	380
120								
S½ SE SW	11	5	65	20	12/3/10	337-258	$ 5,000	$ 700
E½ NW	28	2	66	80	11/26/10	337-266	8,500	1,360
E½ SE&SE NE	8	2	68	120	4/26/10	337-269	10,000	1,300
W½ SW&SE SW NE & S½	2 3	4	63	600	11/22/10	337-288	60,000	3,330
NW	34	2	62	160	11/21/10	337-300	1,600	420
W½ SE&SE SE	10	4	67	120	12/10/10	337-303	12,000	1,630
NW	26	5	66	160	12/14/10	337-313	8,500	1,880
SW	31	12	64	160	12/7/10	337-347	1,600	160
W½ NW	15	2	68	80	12/13/10	337-348	5,000	740
N½ NE	19	6	64	80	12/19/10	337-349	10,000	1,915
W½ NE W½ SE	2 35	3	68	160	11/28/10	337-371	25,000	2,600
All	7	2	67	640	10/26/10	337-387	35,000	5,480
W½ SW	12	4	67	60	1/25/10	337-396	7,500	1,360
NW	2	10	61	160	12/28/10	337-398	1,400	260
NE	1	4	61	172	12/27/10	337-410	6,187	370
NW	23	11	63	160	1/2/11	337-434	3,040	160
SE	8	7	58	160	12/17/10	337-438	1,000	160
NW	5	6	67	160	10/5/10	337-444	25,000	2120
S½ S½	32	9	67	160	12/22/10	337-448	2,400	420
N½ S½	32	9	67	160	12/22/10	337-449	2,400	420
NE	32	7	64	160	1/16/11	337-477	10,000	2,510
W½ NW	34	5	67	80	1/19/11	337-487	6,000	1,360
N½ SE & SE SE	1	2	68	120	1/14/11	337-492	8,400	1,160
S½ NE	6	2	68	80	12/24/10	337-499	13,000	1,702
SE SW&W½ SW	30	5	67	120	1/11/11	337-524	14,000	2,760
SE	27	4	65	160	1/4/11	337-531	10,240	1,520
N½ SE	3	1	68	80	1/28/11	337-538	8,000	450
W½ SW&N½ NW	15	4	65	160	12/20/10	337-542	14,000	2,012
W½ NW	3	7	66	80	1/31/11	337-544	9,000	2,010
All	11	3	66	640	12/21/09	337-568	25,000	1,280
NE SE SW	19 20	4	65	190	9/1/10	337-577	19,000	2,200
N½ SW	12	4	65	80	2/1/11	337-585	$ 1,000	$ 380
NE	13	9	64	160	1/23/11	341- 2	2,900	320
NW	5	11	63	160	6/18/10	341- 16	1,920	160
NW SW	25 24	7	58	320	3/22/10	341- 35	1,600	320
S½ SW	28	2	67	80	1/17/11	341- 38	3,300	800
SE	28	8	56	160	2/7/11	341- 39	1,600	160
NW&W½ NE&N½ SW NW SE	16	2	66	360	10/8/10	341- 43	16,000	3,720
W½ SE	30	5	63	80	2/20/11	341- 55	8,000	1,100
SW	17	4	66	160	2/20/11	341- 57	8,000	2,140
W½ NE NE	16	5	65	20	3/1/11	341- 73	4,000	950
E½ SE	1	7	66	80	3/1/11	341- 80	12,000	2,400
N½ NE	27	5	65	80	11/12/10	341- 82	11,500	1,750

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Record Deed	B. P.	Considera-tion	Assessed Val. 1912
S½ NE	2	8	66	80	3/6/11	341-102	3,200	240
W½ NE	15	5	66	80	3/4/11	341-110	3,350	400
W½ NE&NW SE	6	2	67	120	2/28/11	341-113	2,000	609
SE	26	1	68	160	2/23/11	341-114	5,000	815
W½	21	10	64	320	12/31/10	341-117	6,400	480
W½ SW	6	5	66	80	10/11/10	341-139	7,500	1,230
N½ NW	32	2	66	80	4/11/10	341-142	8,000	990
NE	5	1	63	160	3/1/11	341-147	1,920	100
NW	28	6	61	160	3/21/11	341-178	8,000	1,580
All	23	1	66	640	3/17/11	341-184	16,000	1,920
SE	24	4	68	160	3/2/11	341-186	12,500	420
N½ SE	5	1	66	80	2/6/11	341-190	12,000	2,500
NE	2	1	65	160	4/28/09	341-210	4,000	420
SE	32	2	64					
W½	26	2	65					
All	25	2	65					
All	35	2	65	1760	2/20/11	341-219	10,000	3,520
E½ NW	27	6	66	80	12/30/10	341-222	14,500	2,665
NE	28	6	64	160	4/1/11	341-227	25,000	4,060
122								
E½ SE	30	1	66	80	4/4/11	341-235	$ 6,250	$ 1,300
NE	13	11	63	160	3/1/11	341-242	2,880	
SE	13	11	63	160	3/1/11	341-243	2,880	470
SW	24	7	67	160	3/30/11	341-246	26,000	3,410
S½ NE	3	1	67	80	4/8/11	341-249	8,000	1,530
E½ SW	31	4	66	80	4/1/11	341-266	2,600	535
N½ SW	5	4	67	80	4/11/11	341-274	12,000	1,800
NE SE&W½ SE	11	8	60	120	4/15/11	341-384	1,200	120
N½ SW NW	14	5	65	20	3/30/11	341-295	4,500	600
W½ SE	21	4	68	80	4/26/11	341-329	11,000	1,530
SE SE	22	5	65	40	4/28/11	341-331	4,500	
NE SE	22	5	65	40	4/25/11	341-332	4,500	1,770
S½ SW	20	9	66	80	12/31/10	341-354	2,500	500
NE	14	5	67	160	10/24/10	341-356	4,020	770
NW	2	10	61	160	5/2/11	341-357	1,000	260
All	11	11	62	640	8/10/10	341-366	7,300	640
E½ SE	21	4	68	80	4/1/11	341-378	2,720	490
SW	30							
NW	31	3	67	320	5/8/11	341-381	18,000	4,560
N½ SW	31	5	63	80	4/1/11	341-408	6,000	1,000
S½	31	9	64	320	4/12/11	341-424	3,520	640
NW	8	2	67	160	12/29/10	341-439	8,500	1,350
SW	19	8	63	160	5/12/11	341-443	3,500	480
S½ NW&SW NE& NW SE	5	8	56	160	5/16/11	341-444	3,200	160
N½ N½ SW	30	5	63	40	5/26/11	341-445	6,000	500
N½ SW	16	2	66	80	6/3/11	341-469	3,350	780
NW	21	8	65	160	3/15/11	341-485	6,400	480
NW	24	10	67	160	4/27/11	341-490	3,500	370
All	7	5	62	640	5/13/11	341-497	9,600	640
NE	35	2	67	160	6/1/11	341-501	12,000	2,120

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Record Deed	B. P.	Considera-tion	Assessed Val. 1912
W½ SE	21	4	68	80	5/3/11	341-513	12,000	1,530
SW	18	1	67	160	6/22/11	341-542	6,400	870
123								
NE NE	17							
All	5							
NW	3	4	62	1480	5/31/11	341-566	$ 15,000	$ 1,480
All	31	5	62					
SW	23	2	63	160	6/26/11	341-567	2,000	370
NE	13	9	64	160	5/22/11	349- 13	1,580	320
W½ NE&NW SE	12	2	68	120	6/28/11	349- 20	10,000	1,160
E½ NW	7	4	68	80	7/24/11	340- 42	7,000	1,308
SE	1	7	67	160	1/28/11	349- 43	2,880	480
NW	24	10	67	160	7/31/11	349- 49	4,000	370
E½	31	12	62	320	7/7/11	349- 52	4,000	320
SW	26	10	67	160	8/1/11	349- 54	2,000	370
NE	2	1	68	160	8/7/11	349- 60	11,608	1,500
W½ SW	24	4	66	80	7/13/11	349- 74	8,000	1,400
E½ NE	18	1	66	80	8/10/11	349- 86	14,000	1,720
W½ NW&SE NW & NE SW	24							
All	13							
All	23							
All	25	11	64	2080	8/17/11	349-101	10,000	2,480
S½	17	7	64	320	7/1/11	349-104	7,000	1,600
N½ SE	34	3	65	80	7/24/11	349-112	4,000	240
SE	3	7	66	160	8/21/11	349-117	1,050	160
W½ SW	8	6	63	80	8/22/11	349-119	2,500	300
NW SE&W½ NE	12	2	68	120	7/28/11	349-167	12,000	1,160
W½ NE	32	8	65	80				
E½ NE	32	8	65	80	8/31/11	349-179	17,750	3,450
S½ NW	8	4	68	80	6/1/11	349-185	12,400	2,300
NE	2	7	65					
N½ SE	2	7	65	240	9/9/11	349-189	10,500	3,600
SW	7	3	66	160	9/16/11	349-215	10,000	1,890
N½ SE	1	3	67	80	9/16/11	349-216	7,000	1,000
N½	17	7	63	320	8/30/11	349-222	7,360	960
124								
SW	32	1	65	160	7/19/11	349-235	$ 16,000	$ 580
SE	11	9	61	160	8/18/11	349-238	2,250	210
SE	32							
SW	33	6	67	320	9/29/11	349-257	23,000	3,835
E½ SE	8	2	66	80	9/29/11	349-265	8,000	1,240
N½ SW&SE SW	10	4	67	120	8/24/11	349-312	7,000	1,700
E½ SE	8	2	66	80	10/13/11	349-321	8,000	1,240
N½ SE	18	5	64	80	10/31/11	349-382	11,375	2,010
S½ SE	15	1	63	80	9/29/11	349-384	4,000	240
SE	26	4	61	160	9/11/11	349-400	4,500	320
NE	26	4	61	160	11/15/10	349-404	7,000	1,590
N½ NE	32	5	65	80	11/9/11	349-417	8,000	400
N½ NW	14	4	67	80	11/14/11	349-434	12,000	1,020
S½	12	3	67	320	4/13/11	349-455	24,000	2,535

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Record Deed	B. P.	Considera- tion	Assessed Val. 1912
NW NW&S½ NW & NE So. of UP	33	5	63	63	11/16/11	349-459	7,665	1,740
S½ SE	31	2	66	80	11/21/11	349-476	7,000	1,090
W½ NW	2	5	64	80	11/25/11	349-486	10,000	1,060
E½ NE	32	2	66	80	11/27/11	349-496	8,000	1,460
SW NE	10	4	67	40	11/17/11	349-509	4,750	670
NE SW	11	5	65	40	12/1/11	349-513	6,500	1,080
SE NW	13	5	65	40	12/1/11	349-518	1,250	432
NE NE	23	7	63	40	11/14/11	349-528	1,000	120
E½ SE	3	5	64	80	12/4/11	349-529	6,300	1,180
S½ NW	17	4	66	80	11/11/11	349-551	4,000	520
N½	21	4	66	320	1/14/11	357- 33	24,000	5,100
E½ SW&SW SW	36	3	68	120	7/29/11	357- 46	8,000	1,330
E½ NW	26	1	63	80	12/18/11	357- 49	3,600	240
S½ SW	29	5	67	80	9/19/10	357- 55	12,000	2,160
NE	20	4	66	160	11/25/11	357- 57	16,000	2,600
S½ SW	29	5	67	80	12/26/11	357- 68	12,000	2,160
W½ SE	8	1	66	80	11/17/10	357- 76	12,000	2,200
NW SW	25	2	64	40	12/14/11	357- 87	1,200	80
E½ NE	33	6	64	80	5/5/11	357- 89	10,000	1,750
NE	29	11	63	160	1/4/12	357- 90	800	160
S½ S½	25	2	64	160	1/4/12	357-116	2,400	320
E½	19	12	62	320	5/2/11	357-130	3,080	320
SE SW	8	1	66	40	1/18/12	357-131	6,000	1,100
NE	22	1	67	160	2/11/11	357-136	3,200	240
N½ NE	22	1	67	80	1/20/12	357-142	8,000	1,730
SW NW&W½ SW & SE SW	34	9	65	160	1/23/12	357-159	1,600	470
N½ NW	20	6	65	80	1/23/12	357-152	20,000	3,400
NW NW&E½ NW & NE SW	34	9	65	160	1/23/12	357-160	1,600	420
S½ SW	35	6	66	80	1/24/12	357-167	6,000	2,060
W½ SE	22	5	65	80	1/8/12	357-168	3,000	887
W½ NE	32	6	67	80	12/22/11	357-169	5,600	720
N½ SE	26	6	67	80	1/25/12	357-184	6,500	2,300
S½ NW	35	3	67	80	1/2/13	383 -20	3,650	
N½ SW	35	3	67	80	1/2/13	383 -21	3,650	1,840
NE	19	9	60	160	3/8/13	383- 38	4,000	210
SE	10	9	67	160	4/21/13	383- 44	1,600	370
SW	11	1	67	160	4/12/13	383- 56	3,550	800
All	21	11	61	640	4/15/13	383- 62	6,000	640
E½ SW&E½ W½ SW	35	9	60	120	3/8/13	383- 83	3,000	360
All	3							
SE	13	10	64	800	2/4/11	383-107	4,000	800
S½ SW	6	4	65	80	4/28/13	383-140	12,000	891
E½	31	1	62	320	5/14/13	383-153	4,640	640
SW	6	2	67	160	3/20/12	370-114	14,400	1,571
E½ SE	33	3	67	80	8/25/12	370-177	3,600	400

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Record Deed	B. P.	Considera-tion	Assessed Val. 1912
SW	1	11	66	160	6/29/12	370-311	3,000	160
N½	11	11	65	320	10/30/12	370-327	3,200	320
W½ SE	7	2	68	80	1/13/13	370-343	4,500	720
SE	35	11	63	160	11/19/12	370-372	$ 1,000	210
E½ SW&E½ W½ SW	35	9	60	120	2/7/13	370-424	3,000	300
S½ NW	19	12	67	80	1/28/13	370-463	3,500	840
SW	19	12	56	160	3/6/11	370-512	1,000	160
SW	5	7	63	160	2/15/13	370-540	1,200	480
E½ SE	14	5	64	80	2/26/13	370-552	6,500	1,780
W½ SE	14	5	64	80	2/26/13	370-553	5,000	
E½ NE	27	3	67	80	1/13/12	359- 93	10,000	1,200
N½ NE	19	10	64	80	3/6/12	359-169	1,800	80
S½ NE	19	10	64	80	3/25/12	359-216	1,700	80
W½ SE	12	4	67	80	2/28/12	359-243	10,000	1,415
NE NW&SE NW & E½ SE NW	17	2	68	100	3/18/12	359-245	7,500	720
N½ SE	18	10	61	80	2/8/12	359-268	2,400	130
SW	1	11	66	160	5/17/12	359-367	2,000	160
S½	11	11	65	320	5/14/12	359-378	4,800	320
N½	11	11	65	320	5/22/12	359-379	4,800	320
E½ SW	15	11	61	80	4/18/12	359-401	800	80
W½ SW	15	11	61	80	4/18/12	359-402	800	80
NW SE	5	4	65	60	4/24/12	359-411	4,500	900
E½ SE SE	6							
N½	23	11	60	320	7/5/12	359-494	3,520	320
All	9	11	66	640	7/23/12	359-540	6,400	640
W½ NE	27	3	67	80	6/3/11	346- 5	5,970	1,300
S½ NW	5	4	66	80	10/17/11	346-251	9,000	1,380
N½	23	11	60	320	11/10/11	346-444	3,520	320
NE	23	11	63	160	12/6/11	346-492	2,800	160
W½	3	11	57	320	12/5/11	346-534	5,600	320
SW	27	10	61	160	7/24/11	346-541	2,000	160
SE	3	11	57	160	6/9/11	346-548	2,750	160
127 SE	18	5	67	160	6/16/13	388- 83	$ 12,000	$2,050
SW	14	4	64	160	6/17/13	388 82	3,500	580
SW	34	3	67	160	6/2/13	388- 52	12,000	900
SE	2	6	66	160	5/27/13	388- 47	30,000	4,560
SW	5	8	58	160	5/26/13	388- 43	5,000	370
E½ SW	11	4	67	80	5/22/13	388- 22	16,000	2,200
W½ NE&NW SE. ex. fract. of 22 acres	7	7	67	100	5/10/13	388- 20	10,000	1,500
S½ NW&E½ SW	26	4	68	160	5/10/13	388- 3	5,600	650
E½ NW	34	2	63	80	5/16/13	388- 1	4,000	240
NE	34	4	68	160	1/24/13	374-575	3,782	850
Part S½	21	6	64	107	2/20/13	374-571	13,366	2,420
NE	12	9	67	160	3/28/13	374-557	4,000	700
SE	11	4	67	160	4/11/10	374-546	27,000	3,920

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Deed	Record B. P.	Considera-tion	Assessed Val. 1912
NE	10	4	64	160	3/25/13	374-498	1,600	530
SW NW&W½ SE NW	17	2	68	60	4/14/13	374-497	2,600	900
NW SW	18	5	67	40	2/1/10	374-491	5,000	1,650
SE	11	9	61	160	5/22/13	374-474	3,000	410
NW&N 60 acres in N½ SW& 3 in								
NW NE	17	3	68	223	4/2/13	374-443	33,000	4,150
W½ SE	23	4	61	80	3/20/13	374-405	2,500	420
W½ NW	24	6	67	80	3/13/13	374-388	8,000	2,390
N½ SE	31	2	66	80	3/18/13	374-387	6,300	1,090
W 30 acres of NE SE& part NW SE	11	5	65	42	3/18/13	374-382	7,000	1,260
W½ NW&NW SW SW SE& part E½ SE	4	5	67	120	9/30/12	374-368	10,000	2,020
	12	5	67	104	2/11/13	374-354	12,500	1,700
E½ NE	32	2	66	80	1/28/13	374-348	6,000	1,460
SW	18	3	68	160	3/5/13	374-344	7,600	1,950
SW	6	8	60	160	3/6/13	374-341	1,600	260
SE SW&SW SE	24	5	64	80	1/26/12	374-337	2,440	290
E½ E½ 128	32	5	66	160	3/1/13	374-328	2,500	640
N part NW	30	4	65	80	3/3/13	374-327	7,000	1,500
S½ SE	17	2	66	80	3/3/13	374-309	4,000	1,700
W½ SW	27	8	65	80	1/22/13	374-305	7,000	1,730
NW N of UP	33	5	65	122	2/18/13	374-287	20,000	2,000
SE	29	12	64	160	2/20/13	374-281	2,000	160
NE	26	5	61	160	2/19/13	374-267	1,200	210
NE	33	9	60	160	2/14/13	374-251	1,200	210
S½ SE	20	1	66	80	2/15/13	374-243	10,000	1,960
N½ SW	21	5	65	80	2/15/13	374-234	3,000	420
W½ SE	28	6	64	80	2/6/13	374-211	7,500	1,760
E½ NW	27	6	66	80	2/10/13	374-209	14,000	2,800
SE NW&S½ NE	8	3	68	120	10/31/12	374-206	15,000	3,080
NE	20	4	66	160	1/25/13	374-204	20,000	2,600
NE	7	7	58	160	12/2/12	374-197	1,500	160
E½ SE	20	6	66	80	1/18/13	374-178	14,000	2,100
E½ NE	10	3	67	80	1/11/13	374-174	3,200	900
W½ SE	8	2	66	80	9/19/10	374-170	7,500	1,660
SE	20	5	61	160	12/10/12	374-164	1,800	210
NW	24	6	65	160	1/29/13	374-159	12,000	4,200
NE	12	10	67	160	1/23/13	374-145	4,000	320
N 60 acres of NW	10	3	68	60	1/21/13	374-138	6,500	1,360
N½ SE	15	1	63	80	11/1/12	374-124	3,500	240
W½ NW	22	3	67	80	1/14/13	374-112	10,000	1,160
SE SE	13	4	66	40	1/29/10	374-109	4,000	580
NE	14	7	66	160	1/20/13	374-101	30,000	6,550
N½ NW	14	1	67	80	1/3/13	374-100	9,500	1,520
Weld-b								
S½ SE	19	4	66	80	6/21/12	374- 92	10,000	1,110
W½ SE	26	4	66	80	12/30/12	374- 90	3,000	1,050

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Record Deed	B. P.	Considera-tion	Assessed Val. 1912
W½ NE	18	5	64	80	12/21/12	374- 68	$12,000	$2,260
SE SE	25	6	66	40	8/7/12	374- 53	5,550	1,160
NE	30	3	65	160	12/30/12	374- 51	1,000	320
NE	28	10	61	160	12/28/12	374- 43	2,400	210
80 acres in NW	22	2	68	80	12/26/12	374- 27	7,500	1,400
NW NW&N½ NE & SE NE	20	6	63	160	12/24/12	374- 21	7,500	480
W½ NW	28	2	66	80	11/21/12	374- 11	8,000	1,460
E½ NE	6	4	68	80	10/4/12	365-581	14,800	1,620
NW	17	7	56	160	11/21/12	365-578	2,000	320
NE	17	7	56	160	11/21/12	365-579	2,000	320
N½ SW	10	4	67	80	12/9/12	365-574	6,500	1,240
S½ NW	2	4	67	80	12/17/12	365-562	5,200	1,180
W½ SE	26	4	66	80	11/29/12	365-561	3,000	1,050
SE	29	1	67	150	12/6/12	365-550	2,500	800
S½ NW&SW&W½ SE	7	10	60	317	12/10/12	365-538	1,215	320
E½ SW	7	4	68	80	12/2/12	365-530	14,500	2,600
E½ NE	32	2	66	80	12/9/10	365-529	8,000	1,460
E½ SW	1	7	66	80	11/21/12	365-525	12,000	2,240
W½	15	1	63	320	10/1/12	365-524	16,000	640
All	7	2	35	640	10/12/12	365-522	47,361	1,920
E½	21	8	63	320	11/15/12	365-512	4,500	640
E½ SE	30	4	66	80	11/14/12	365-492	2,315	1,500
SW	14	4	67	160	11/15/12	365-488	3,550	1,580
S½	30	7	67	320	9/9/12	365-487	35,000	3,540
W½	1	8	66	320	1/24/11	365-485	12,800	1,600
SE	21	2	68	160	11/20/12	365-479	8,000	1,380
NW	22	4	63	160	11/18/12	365-470	4,500	370
SW	34	8	65	160	11/15/12	365-462	16,000	3,500
SE & SE NE	35	7	63	200	11/4/12	365-441	10,000	600
N½	14	8	64	320	10/26/12	365-434	8,000	960
SW	14	2	65	160	10/5/12	365-414	4,000	320
NW	23	6	61	160	8/21/12	365-383	1,000	210
S½ SE	2	8	66	80	10/12/12	365-364	3,900	500
E½ NW	4	4	65	80	10/12/12	365-362	6,000	1,700
SW W of RR	3	4	65	68	10/12/12	365-361	5,000	800
E 94 acres of SE 130	22	3	68	94	10/12/12	365-349	10,000	2,350
E½ SW	14	3	66	80	3/23/12	365-348	1,200	290
W½ NW	33	2	63	80	10/26/11	365-303	3,200	150
W½ NW	26	1	63	80	9/25/12	365-297	3,600	240
N½ NE	33	1	68	80	7/19/12	365-293	5,600	400
E½ SW	24	4	65	80	9/16/12	365-278	4,500	550
E 120 acres SW	1	4	68	120	9/5/12	365-258	14,250	3,400
Part of SE SE	5	3	68	20	8/27/12	365-231	1,500	60
W½ NE	28	8	65	80	7/20/12	365-222	12,000	1,940
NE	2	3	66	160	8/22/12	365-217	4,600	320
N½	31	8	64	320	1/6/12	365-211	8,000	960

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Deed	Record B. P.	Considera-tion	Assessed Val. 1912
NE	31							
SE	30	5	66	320	7/30/12	365-203	$12,800	$3,020
SE	26							
NW	35	5	65	312	8/12/12	365-196	25,000	3,150
N½ NW	27	2	62	80	8/3/12	365-188	1,600	160
N of Ditch NW	10	5	64	80	8/18/10	365-180	10,000	1,400
NW	23	11	63	160	2/28/12	365-171	3,000	160
E½ W½ SE	21	5	65	40	7/26/12	365-169	6,000	560
Weld-e								
NW	34	1	66	160	7/24/12	365-163	700	580
E½ NE	26	4	68	80				
N½ NW	26	4	68	80	6/14/12	365-151	4,000	1,540
NE	10	3	63	160	11/15/11	365-124	1,500	320
S½ SE SW	11	5	65	20	7/1/12	365-108	5,000	700
S½	33	1	66	320	6/20/12	365- 98	16,000	1,740
S½ SE	19	4	66	80	3/15/12	365- 86	8,500	1,210
SE NW&S½ NE & S½	13							
S½ SW&SE	14							
SE	15							
N½ N½	23	4	62	1000	5/28/12	365- 83	125,000	4,700
E½ E½ SW&W½ W½ SE W½ E½								
W½ SE	20							
N½ E½ W½ NE								
E½ E½ NW&N½ W½ NE	29	4	61		5/28/12	365- 82	25,000	2,140
131								
N½ NW	11	1	67	80	5/24/12	365- 51	2,000	400
SW NW	11	4	66	40	5/1/12	365- 46	3,000	120
W 64 acres W½ SW	29	1	66	64	5/21/12	365- 42	6,750	1,450
All	1							
All	3							
All	5	11	65	1920	3/2/12	365- 37	21,600	1,920
SE	8	1	62	160	6/6/12	365- 31	2,400	210
E½ E½&SW SE	12	2	68	200	9/6/10	357-586	14,000	2,400
30 acres in N½ SE	18	1	66	30	5/17/12	357-581	3,700	800
All	1	11	66	640	3/13/12	357-577	6,400	640
S½ NW&NW NW	31	9	64	120	4/24/12	357-572	1,500	240
N½ SW	5	4	65	80	5/11/12	357-571	5,000	400
W½ SE	21	4	61	80	3/18/12	357-570	2,500	440
S½ SW	26	5	65	80	3/27/12	357-567	5,500	1,200
NW	11	1	67	160	5/16/12	357-557	4,000	800
S½ NE (except NE SE NE)	19	1	66	70	4/23/12	357-532	7,000	870
W 64 acres W½ SW	29	1	66	64	5/4/12	357-531	6,000	1,420
All	9	11	65	640	5/3/12	357-530	9,600	640
NE	18	5	67	160	4/12/12	357-527	2,550	2,650
E½ NE	28	8	65	80	5/6/12	357-525	4,750	1,730

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Record Deed	Date of Record B. P.	Considera-tion	Assessed Val. 1912
E 16 acres W¼ SW								
W 34 " E½ SW	29	1	66	50	5/4/12	357-520	5,000	1,000
All	9	11	66	640	5/24/12	357-519	8,000	640
E½ W½ E½ SW	34	1	67	20	4/25/12	357-497	850	100
S½ SE	20	2	66	80	4/4/12	357-495	12,000	2,330
N½ E½ SE	30	1	66	40	4/8/12	357-468	4,300	900
S½ NW&N½ SW SW SW&SW NE & NW SE	24							
NW	26	3	67	440	4/11/12	357-459	24,200	5,466
N½ NW	31	5	67	80	2/23/12	357-450	8,000	2,120
N½ E½ SE	30	1	66	40	4/1/12	357-421	4,500	680
SE of UP in NE	12	4	66		3/12/12	357-405	$ 7,750	$ 2,480
W½ NW and strip off W side E½ NW	6	3	66	80 / 24	3/7/12	357-399	18,100	1,000
S½ SW	24	5	65	80	3/5/12	357-382	12,000	2,000
All	9	11	66	640	3/2/12	357-378	8,000	640
All	7	11	61	640	12/30/11	357-376	9,600	640
W½ NW	4	4	66	80	2/14/12	357-339	6,000	940
Weld D. SE SW SW 33 acres in W½ NW	18 / 17 / 20	6	66	233	3/1/12	357-324	14,000	4,700
E½ W½ SE	21	5	65	40	2/28/12	357-319	5,000	560
SE W&N of draw and N&E of ditch	31	5	67	60	2/26/12	357-318	1,500	1,920
W½ NE N½ SW&SE SW & SW SE	32 / 29	3	67	240	2/17/12	357-295	24,000	2,280
E½ E½	32	3	67	160	2/17/12	357-294	16,000	1,190
W½ SW	13	5	65	80	2/23/12	357-293	10,000	1,340
W½ SW	22	6	67	80	2/20/12	357-289	8,000	2,200
NE	35	3	67	160	2/21/12	357-288	15,000	1,860
NE	13	9	61	160	2/21/12	357-279	2,500	210
NW	24	5	67	160	2/23/12	357-268	2,000	800
NE NE	10	5	66	40	1/12/12	357-262	4,500	670
NE	19	10	61	160	1/28/11	357-257	2,000	210
E 60 acres of W½ SW NE SW	20 / 20	6	67	100	2/13/12	357-247	5,000	1,420
S½ E½ SE	30	1	66	40	2/14/12	357-237	5,000	680
S½ NW (except E 20 acres)	17	2	68	60	1/11/12	357-228	4,500	450
NW	24	5	67	160	2/9/12	357-214	3,000	800
E½ SE	8	2	66	80	2/6/12	357-208	8,000	1,240
NW SW SE & SW SW SE	11	4	67	20	5/27/13	362- 85	4,000	500

Part of Section	Sec.	Twp.	Rg.	Acres	Date of Deed	Record B. P.	Considera-tion	Assessed Val. 1912
NE SW	13	5	64					
S½ SW Ex. 40 acres	13	5	64	80	2/26/13	362- 79	$8,000	$1,200
NW SW ex. 1 [acres]	13	5	64	39	2/26/13	362- 77	4,000	420
W½ NE	11	5	64	80	2/26/13	362- 74	7,700	1,380
S½ NE	14	5	64	80	2/26/13	362- 73	6,400	1,560
SE	13	5	64	157	2/26/13	362- 68	12,500	1,340
E½ NW	13	5	64	80	2/26/13	362- 66	10,000	1,400
E½ NE	11	5	64	80	2/26/13	362- 62	4,640	800
Part E½ SW	10	5	64					
NE NW	15	5	64	108	2/26/13	362- 61	5,400	1,520
W½ NW	13	5	64	80	2/26/13	362- 60	9,500	1,400
N½ SE	20	8	66	80	12/26/12	362- 49	5,000	240
SW	4	2	66	160	8/24/12	362- 28	1,800	480
SW	19	12	56	160	3/12/13	359-578	2,400	160
SW NW (& 20 acres in) N½ SW	12	5	64	140	3/12/13	359-592	9,600	1,200
NE & N½ SE	33	8	59	240	3/13/13	359-565	2,500	480
W½ SE	14	5	64	80	2/26/13	359-553	5,000	900
E½ SE	14	5	64	80	2/26/13	359-552	6,500	900
SW	5	7	63	160	2/15/13	359-540	1,200	480
110 A. in NE	35	4	66	110	12/26/11	359-494	11,000	1,140
S½ NW	8	7	67	80	1/28/13	359-463	6,500	840
N½ SE	1	11	66	80	2/14/12	359-446	4,800	80
E½ SW&E½ W½ SW	35	9	60	120	2/7/13	359-424	3,000	480
Weld-e								
E½ SW& Lot 3	18	8	56	120	2/1/13	359-390	1,000	120
SE	35	11	63	160	12/19/12	359-372	1,000	210
W½ SE	7	2	58	80	1/13/13	359-343	4,500	720
N½	11	11	65	320	10/30/12	359-327	3,200	320
SW	11	10	67	160	12/2/12	359-289	3,200	1,240
E½ SW	22	5	65	80	9/13/12	359-259	5,800	820
E½ SE	33	3	67	80	8/25/12	359-177	3,600	400
SW	6	2	67	144	3/20/12	359-114	14,400	1,400
						Totals	$3,443,889	$512,519

134 Per cent. of assessed valuation to sales value 14.88%.

Endorsed: Affidavit of Arthur H. Scribner. Filed in the District Court on Sept. 1, 1913.

Affidavit of F. A. Hensley.

State of Colorado,
City and County of Denver—ss.

F. A. Hensley, of Hudson, County of Weld, state of Colorado, being first duly sworn, upon his oath deposes and says: That

he is now, and has been for three years past, a dealer in
135 real estate, with offices in Hudson, County of Weld, State of Colorado; that during the time above mentioned he has dealt in irrigated and non-irrigated lands in the county of Weld, buying and selling the same, and is familiar with the irrigated and non-irrigated lands in the county of Weld, and particularly in the vicinity of Hudson, and of the values thereof.

That the patented non-irrigated lands in the townships one (1) and two (2) north of ranges sixty-four (64) and sixty-five (65) west of the sixth principal meridian, had in the spring of 1910, and at the time of the assessment, the minimum value of eight ($8.00) dollars per acre, and the maximum value of fifteen ($15.00) dollars per acre, giving an average value of approximately eleven ($11.00) dollars per acre.

That the patented lands subject to irrigation by The Henrylyn Irrigation District System in townships one (1) and two (2) in ranges sixty-four (64) and sixty-five (65), and in township two (2) north of range sixty-four (64) west, had in the spring of the year 1910, and at the time the assessment for the year 1910 was made, a minimum value of twenty-five ($25.00) dollars per acre, and a maximum value of approximately fifty ($50.00) dollars per acre, the average value thereof being approximately thirty-six ($36.00) dollars per acre.

136 Affiant further says that he personally had knowledge of and was and is fully advised as to the actual consideration which passed at the sale and conveyance of each of the tracts of land hereinafter specifically described, and knows that the consideration shown in the recorded deeds thereof were bona fide and represented the actual and true value at which said lands were sold, and the true and actual value thereof during the spring of the year 1910, and at the time the assessment for the year 1910 was made; that said lands and the consideration which passed at the sales thereof and the dates of the instruments conveying the same were filed for record are as follows:

Assessed Valuation 1912	Description	Consideration	Date of Filing
$480	The NW¼, S 13, T 1 N, R 65 W, containing one hundred sixty acres	$4,000	April 1, 1909
480	The SE¼, S 14, T 1 N, R 65 W, containing one hundred sixty acres	3,600	Jan. 13, 1910
480	The NW¼, S 14, T 1 N, R 65 W, containing one hundred sixty acres	6,080	Dec. 14, 1909
320	The NE¼, S 19, T 2 N, R 64 W, containing one hundred sixty		
137	acres	4,000	Mar. 16, 1910
320	The SE¼, S 19, T 2 N, R 64 W, containing one hundred sixty acres	4,000	May 13, 1910
320	The SE¼, S 23, T 2 N, R. 64 W, containing one hundred sixty acres	4,800	Mar. 31, 1909
1800	The NE¼, S 5, T 1 N, R 65 W, containing one hundred sixty acres	12,800	Feb. 3, 1910

Further affiant saith not.

F. A. HENSLEY.

Subscribed and sworn to before me this 5th day of September, A. D. 1911.

My commission expires October 31st, 1914.

(Notarial Seal) WALTER E. WILMOT,
Notary Public.

Endorsed: Filed in the District Court on Sept. 1, 1913.

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138 Affidavit of J. U. Harris.

State of Colorado,
City and County of Denver—ss.

J. U. Harris, of lawful age, being first duly sworn, on oath deposes and says:

That he is now, and has been for about five years last past, State Land Appraiser, duly appointed by the State Board of Land Commissioners of the State of Colorado; that during said time he has appraised and reported to said State Land Board the appraised value of various lands owned by the state of Colorado in Weld County, Colorado; that in making said appraisements of state lands affiant personally inspected said

139 state lands and knows that the appraised values thereof made by himself were at the time of the appraisements thereof the true and actual values of said lands; that said appraisements were all duly reported to and approved by said State Board of Land Commissioners; that the dates of said appraisements, the description of said lands and the appraised values thereof were as follows:

Date of Appraisement	Description: Section	Township	Range	Appraised value per acre.
January 30, 1910	16	9	56	$ 8.00
November 12, 1910	36	9	56	8.00
January, 14, 1910	16	7	56	10.00
January 14, 1910	36	7	56	10.00
June 28, 1910	36	7	57	12.00
June 30, 1910	36	8	57	14.00
June 23, 1910	36	10	57	8.00
July 22, 1909	16	11	57	8.00
July 22, 1909	36	11	57	8.00
November 10, 1910	16	12	57	8.00
April 28, 1910	16	8	58	10.00
June 28, 1910	36	8	58	14.00
December 1, 1910	36	11	58	10.00
April 15, 1909	36	7	59	9.00
April 26, 1910	36	8	59	10.00
November 10, 1910	16	10	59	11.00
November 10, 1910	36	10	59	8.00
June 28, 1910	16	7	60	12.00
February 4, 1910	36	7	60	9.00
September 16, 1909	16	8	60	12.00
September 16, 1909	36	8	60	12.00
September 13,1909	36	9	60	30.00
January 20, 1910	16	10	60	10.00
January 14, 1910	16	11	60	10.00
February 27, 1910	16	2	61	10.00
October 25, 1909	36	2	61	$ 8.00
October 25, 1909	16	3	61	6.50
April 27, 1909	36	3	61	16.00
April 13, 1910	16	4	61	11.00
September 29, 1910	16	5	61	10.00
December 8. 1910	36	(part. irri.)		20.00
April 16, 1909	16	8	61	15.00
February 4, 1910	36	8	613	10.00
January 15, 1910	36	9	61	12.00
January 21, 1910	16	10	61	12.00
April 11, 1910	16	1	62	10.00
April 28, 1910	16	3	62	14.00
April 27, 1909	36	3	62	10.00
April 26, 1910	16	4	62	12.00
April 22, 1910	16	5	62	8.00
January 20, 1910,	16	7	62	10.00

Date of Appraisement	Section	Description: Township	Range	Appraised value per acre.
January 20, 1910	16	8	62	12.00
September 16, 1909	36	8	62	10.00
September 29, 1909	16	9	62	10.00
September 17, 1909	36	9	62	10.00
July 30, 1909	36	10	62	10.00
March 8, 1910	16	11	62	11.00
April 15, 1909	36	11	62	15.00
September 17, 1909	36	12	62	9.00
April 11, 1910	16	2	63	12.00
September 23, 1910	16	4	63	10.00
September 29, 1910	16	5	63	8.00
September 20, 1910	36	5	63	7.00
October 15, 1909	16	10	63	10.00
April 10, 1910	36	9	54	20.00
September 16, 1909	16	7	59	9.00
July 16, 1909	36	7	59	10.00
April 20, 1910	36	8	59	10.00
January 1, 1911	36	12	61	$ 15.00
do	16	11	63	30.00
January 1, 1911	22	5	62	6.00
do	26	5	62	6.00
do	27	5	62	6.00
November 23, 1910	16	5	64 (72 A.)	40 00
do	16	5	64 (80 A.)	100.00
do	16	5	64 (40 A.)	90.00
March 6, 1911	36	1	61	15.00
March 8, 1911	16	3	63	10.00
do	31	3	62	30.00
March 9, 1911	36	3	64	8.00
do	4	3	62	8.00
do	5	3	62	8.00
do	63	3	62	8.00
do	9	3	62	8.00
do	15	3	62	8.00
do	36	2	63	15.00
March 13, 1911	36	1	64 (160 A.)	15.00
do	36	1	64 (80 A.)	15.00
March 18, 1911	16	3	64	10.00
March 20, 1911	36	3	65	15.00
April 3, 1911	16	7	57	12.00
do	36	10	61	15.00
do	16	6	61	12.00
do	36	7	61	10.00
April 7, 1911	16	8	57	10.00
do	16	9	58	10.00
do	36	11	60	10.00
May 10, 1911	28	6	63	8.00
do	12	5	64	8.00
June 14, 1911	36	5	61	45.87½

Date of Appraisement	Description: Section	Township	Range	Appraised value per acre.
June 15, 1911	36	5	64 (236 A.)	$45.00
do	36	5	64 (320 A.)	47.00
August 5, 1911	16	3	68	65.00
October 20, 1911	36	10	60	12.00
do	163	11	60	12.00
do	36	12	61	12.00
do	24	5	62	8.00
do	25	5	62	8.00
October 19, 1911	1	5	623	8.00
do	16	5	62	8.00
January 19, 1912	13	10	56	10.00
do	14	10	56	10.00
do	23	10	56	10.00
do	24	10	56	10.00
do	23	10	56	10.00
January 15, 1912	36	12	59	10.00
January 16, 1912	11	5	59	12.00
do	12	5	59	12.00
do	13	5	59	12.00
do	14	5	59	12.00
do	24	5	59	12.00
do	23	5	59	12.00
do	25	5	59	12.00
January 25, 1912	20	7	62	10.00
do	20	7	62	10.00
November 15, 1911	6	4	62	10.00
do	8	4	62	10.00
do	26	4	62	10.00
January 10, 1912	8	3	62	8.00
do	17	3	62	8.00
January 10, 1912	18	3	62	8.00
do	60	3	62	8.00
January 22, 1912	36	7	63	10.00
January 15, 1912	4	5	63	9.00
do	6	5	63	9.00
do	18	5	63	9.00
do	20	5	63	9.00
do	32	6	63	9.00
January 12, 1912	8	5	63	8.00
December 18, 1911	36	4	65	14.00
January 9, 1912	16	3	65	15.00
January 26, 1912	16	5	66	12.00
January 9, 1912	36	3	66	30.00
July 16, 1912	36	8	56	14.00
do	16	10	59	8.00
do	36	10	59	8.00
do	6	11	60	15.00

Date of Appraisement	Description: Section	Township	Range	Appraised value per acre.
March 11, 1912	22	3	62	10.00
do	23	3	62	10.00
do	26	3	62	10.00
do	27	3	62	10.00
do	34	3	62	10.00
do	35	3	62	10.00
June 14, 1912	16	5	64	125.00
February 20, 1912	16	5	66	60.00
March 11, 1912	36	9	69	12.00
July 16, 1912	16	5	64	70.00
May 14, 1912	16	3	68	65.00
July 31, 1912	36	9	57	7.50
August 10, 1912	16	7	59	10.00
September 14, 1912	16	6	63	37.50
August 8, 1912	36	10	64	10.00
July 20, 1912	36	11	64	8.00
August 8, 1912	36	12	64	7.50
October 16, 1912	16	5	65	115.00
October 16, 1912	16	10	65	10.00
August 9, 1912	36	5	66	18.00
August 12, 1912	36	1	66	18.00
do	36	4	67 (80 A.)	35.00
do	36	4	67 (240 A.)	32.50
October 17, 1912	16	10	67	8.00
August 12, 1912	36	4	67	30.00
September 13, 1912	16	4	68	60.00
August 10, 1912	16	10	60	12.00
August 22, 1912	3	5	62	8.50
do	10	5	62	8.50
do	11	5	62	8.50
do	12	5	62	8.50
do	15	5	62	8.50
January 7, 1913	16	10	58	7.00
December 18, 1912	16	11	56	9.00
February 3, 1913	16	9	68	30.00
February 5, 1913	16	7	67	17.00
December 31, 1912	36	5	61	20.00
January 7, 1913	16	11	61	11.00
January 16, 1913	8	8	62	15.00
do	173	8	62	15.00
February 1, 1913	16	10	64	10.00
February 11, 1913	16	3	66	20.00
February 3, 1913	16	11	66	10.00
February 21, 1913	16	11	58	10.00
February 3, 1913	14	10	66	12.00
October 4, 1912	36	2	62	12.00
October 8, 1912	16	3	62	13.00
February 1, 1913	36	4	67	27.50
February 19, 1913	16	6	66	50.00
February 17, 1913	16	7	66 (240 A.)	45.00

Date of Appraisement	Description: Section	Township	Range	Appraised value per acre.
February 15, 1913	16	7	66 (160 A.)	$65.00
February 7, 1913	16	6	66	75.00
February 18, 1913	16	7	66	75.00
February 14, 1913	16	7	66	75.00
October 4, 1912	15	3	62	14.00
do	22	3	62	14.00
January 9, 1913	36	2	66	22.00
October 5, 1912	2	3	63	10.00
October 29, 1912	2	3	62	15.00
do	11	3	62	15.00
do	14	3	62	15.00
November 12, 1912	21	3	62	20.00
do	28	3	62	20.00
do	31	3	62	20.00
do	32	3	62	20.00
do	2	2	62	12.00
do	26	3	62	12.00
November 11, 1912	5	2	61	9.00
do	7	2	61	9.00
do	8	2	61	9.00
do	17	2	61	9.00
do	18	2	61	9.00
June 16, 1913	16	6	64	40.00
do	36	8	67	35.00
November 11, 1912	36	4	63	9.00
do	36	3	63	13.00
June 19, 1913	32	10	66	16.00
July 28, 1913	4	2	61	12.00
do	9	2	61	12.00
do	31	3	61	10.00

Affiant further states that in making said appraisements he was required to and did actually go upon said lands
146 and, while said appraisements were being made and after said appraisements were made, was frequently required to go into and through the townships in Weld County, Colorado in which said lands were and are located; that affiant knows that the true and actual value of said lands during the spring of the year 1912, and at the time the assessment for the year 1912 was made, was not less than the said appraised value thereof.

Affiant further states that appraisements of other state lands in said townships were made by other state appraisers, and that he was and is familiar with the value of the state lands so appraised; that the value of said lands during the spring of the year, and at the time the assessment for the year 1912 was made, was not less than the appraised values thereof; that a

description of said lands so appraised and the appraised value thereof, or the true and actual value thereof, during the spring of said year, and at the time said assessment for said year was made, were as follows:

Section	Township	Range		Value per acre
16	7	57		$12.00
16	8	57		12.00
16	10	57		8.00
16	7	58		10.00
36	7	58		10.00
16	9	58		10.00
36	9	58		10.00
16	10	58		10.00
36	10	58		$10.00
16	11	58		10.00
36	11	58		8.00
16	7	58		8.00
16	8	59		9.00
16	11	59		8.00
36	11	59		8.00
36	12	59		8.00
36	9	60		15.00
36	10	60		10.00
36	11	60		10.00
36	12	60		8.00
16	1	61		12.00
36	1	61		15.00
36	4	61		9.00
16	6	61		12.00
36	6	61		10.00
16	7	61		16.00
36	7	61		10.00
16	9	61		12.00
36	10	61		15.00
16	11	61		8.00
36	11	61		8.00
36	12	61		15.00
36	1	62		9.00
16	2	62		9.00
36	2	62		9.00
36	4	62		10.00
36	5	62		8.00
16	6	62		7.00
36	6	62		8.00
36	7	62		10.00
16	1	63		$15.00
36	1	63		12.00
36	2	63		15.00
16	3	63		10.00
36	3	63		11.00
36	4	63		9.00
36	6	63	(under ditch)	30.00
16	7	63	(under ditch)	30.00

Section	Township	Range		Value per acre
36	7	63	(under ditch)	25.00
36	8	63	(under ditch)	40.00
16	9	63		9.00
36	9	63		9.00
36	10	63		10.00
16	9	54		10.00
16	10	64		10.00
36	10	64		10.00
36	11	64		10.00
16	11	64		10.00
36	12	64		8.00
16	9	58		10.00
36	9	58		10.00
16	11	58		9.00
36	11	58		8.00
36	7	59		9.00
16	7	59		10.00
16	8	59		9.00

Affiant further says that the greater portion of said lands hereinabove described, during the spring of the year 1912, and at the time the assessment for the year 1912 was made, were dry lands, without source of water supply for irrigation pur-
149 poses; that the value thereof during and at said time depended upon the character of the land, its location, soil and topography; that said non irrigated lands had in the spring of 1912, and at the time of the assessment for the year 1912, a minimum value of approximately eight dollars per acre, and a maximum value of approximately sixteen dollars per acre, and an average value of approximately twelve dollars per acre.

Affiant further states that other lands in said townships, exclusive of state lands, were of the same general character as said state lands hereinabove described; that said other lands were and are dry, or non-irrigated, lands, and were and are substantially of the [of the] same general character as said state lands, with respect to soil, topography and practicability of irrigation. Affiant states that he personally has been upon and over many of said lands, including said state lands as aforesaid, and knows the value of said lands; that said non-irrigated lands other than non-irrigated state lands in said townships had in the spring of 1912, and at the time the assessment for the year 1912 was made, the same minimum, maximum and average value as the state lands hereinabove described.

Affiant further states that, in addition to the state lands appraised as aforesaid, the following state lands subject to irrigation by means of pumping plants, were appraised
150 as follows:

Date of Appraisement	Section	Description Township	Range	Value per acre
October 15, 1910	36	11	63	$25.00
October 15, 1910	16	11	63	30.00
May 15, 1910	16	10	62	25.00

Affiant further states that all state lands sold by the state are, in accordance with law, sold at public auction to the highest bidder, at sums not less than the appraised value thereof; that during the years 1909, 1910, 1911 and 1912 state lands in Weld County, as shown by the records of the State Land Commissioners of the State of Colorado, and as published in its biennial report for said years, were sold; that the dates of sale, description of lands sold during said years and price per acre were as follows;

Date of Sale	Acres	Subdivision	Sec	Twp.	Range	Price per acre
1-6-1909	160	NE¼	16	2N	67 W	$15.00
	160	SE¼	16	2N	67 W	20.25
	320	S½	16	4N	62 W	10.00
	160	NE¼	36	2N	64 W	24.00
	160	NW¼	36	2N	64 W	22.00
	160	SW¼	36	2N	64 W	25.50
	160	SE¼	36	2N	64 W	26.50
	200	S½ of SE¼	11	9N	63 W	5.00
		W½ of NW¼	13	9N	63 W	5.00
		NE¼ of NE¼	14	9N	63 W	5.00
	80	E½ of NW¼	13	9N	63 W	5.00
	120	E½ of NE¼; NE¼ of SE¼	13	9N	63 W	5.05
	80	W½ of NE¼	13	9N	63 W	5.05
	240	N½ of NE¼; SE¼ of NE¼ NE¼ of NW¼; S½ of SE¼	32	12N	67 W	3.50
3-3-1909	160	NW¼	36	7N	65 W	33.00
	160	SE¼	36	7N	65 W	41.00
	160	NE¼	36	7N	65 W	30.00
	160	SW¼	36	7N	65 W	35.00
	615	NE¼; Lots 1 and 2; E½ of NW¼: E½ of SW¼; SE¼	30	12N	67 W	3 50
	77.30	W½ of NW¼	16	5N	66 W	20.25
6-2-1909	160	NE¼	8	8N	63 W	10.00
11-3-1909	160	NE¼	16	1N	68 W	22.50
	160	NW¼	16	1N	68 W	22.50
	320	S½	16	1N	68 W	22.50
12-1-1909	320	N½	16	9N	62 W	10.00
	320	S½	16	9N	62 W	10.00
1-5-10	640	All	36	11N	62 W	20.00
	160	NE¼	16	1N	67 W	20.00
	320	W½	16	1N	67 W	25.00

Date of Sale	Acres	Subdivision	Sec.	Twp.	Range	Price per acre
	159	NE¼	16	7N	64 W	$26.00
	160	NW¼	16	7N	64 W	27.00
	160	SW¼	16	7N	64 W	28.00
	160	SE¼	16	7N	64 W	25.00
	160	NE¼	16	2N	64 W	21.50
	160	SW¼	16	2N	64 W	23.50
	160	NW¼	16	2N	64 W	17.00
	160	SE¼	16	2N	64 W	29.00
	160	NE¼	36	1N	65 W	25.50
	160	NW¼	36	1N	65 W	20.50
	160	SW¼	36	1N	65 W	20.00
	160	SE¼	36	1N	65 W	21.00
	40	SW¼ of SE¼	17	2N	62 W	10.00
	40	SE¼ of SE¼	17	2N	62 W	13.00
	160	NE¼	8	9N	62 W	12.00
2-2-1910	160	NW¼ of SW¼	5	9N	62 W	
		SE¼ of SW¼	5	9N	62 W	
		NW¼ of SE¼	5	9N	62 W	
		NW¼ of SE¼	8	9N	62 W	10.00
	80	S½ of SE¼	5	9N	62 W	10.25
	160	NE¼	36	3N	63 W	22.00
	160	SW¼	36	3N	63 W	18.00
	160	SE¼	36	3N	63 W	26.00
	160	SW¼	36	6N	65 W	74.50
	160	NW¼	36	6N	65 W	74.50
4-6-1910	150.072	NE¼	36	1N	68 W	25.00
	160	NW¼	36	1N	68 W	25.00
	160	SW¼	36	1N	68 W	25.00
4-6-1910	157.65	SE¼	36	1N	68 W	30.00
	160	NE¼	36	2N	61 W	8.00
	160	NW¼	36	2N	61 W	15.75
	160	SW¼	36	2N	61 W	12.00
	1603	SE¼	36	2N	61 W	11.00
5-4-1910	160	NE¼	163	3N	66 W	21.75
	158.4	NE¼	16	11N	62 W	13.00
	105.1	NW¼	16	11N	62 W	6.25
	111	SW¼	16	11N	62 W	6.92
	159	SE¼	16	11N	62 W	15.00
	40	NE¼ of SW¼	5	9N	62 W	10.00
7-6-1910	160	S½ of S½	12	9N	66 W	13.25
	320	W½	36	10N	67 W	18.00
	160	NE¼	36	10N	67 W	18.00
	159	SE¼	36	10N	67 W	18.00
	150.728	NW¼	36	7N	67 W	60.00
	80	W½ of NW¼	36	5N	67 W	37.50
8-3-1910	80	S½ of SW¼	12	3N	63 W	10.00
	80	N½ of NE¼	12	3N	63 W	10.00
10-5-1910	160	NE¼	16	7N	61 W	8.00
	160	NW¼	16	7N	61 W	8.00
	160	SE¼	23	4N	62 W	17.00

Date of Sale	Acres	Subdivision	Sec.	Twp.	Range	Price per acre
12-7-1910	156.42	NE¼	16	10N	67 W	14.00
	159.56	NW¼	16	10N	67 W	8.00
	156.07	SE¼	16	10N	67 W	12.00
1-4-1911	320	NE¼ SE¼	16	5N	61 W	10.00
	160	NW¼	16	5N	61 W	10.00
	160	SW¼	16	5N	61 W	10.00
4-5-1911	40	NE¼ of NE¼	8	10N	64 W	6.00
11-1-1911	1.52	Part NE¼	16	3N	68 W	329.00

And further affiant saith not.

JAMES U. HARRIS.

Subscribed and sworn to before me this 7th day of August A. D. 1913.

My commission expires October 15, 1913.

(Notarial Seal) JAMES T. NAFF,
Notary Public.

Endorsed: Filed in the District Court on Sept. 1, 1913.

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154 (Record Entry of Hearing, Sept. 1, 1913.)

Before Judge Lewis.

This cause comes on now to be further heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire, appearing as solicitor for the plaintiff and Charles F. Tew, Esquire, appearing as solicitor for the defendants. And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

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155 (Record Entry of Hearing, Sept. 2, 1913.)

Before JUDGE LEWIS.

This cause comes on now to be further heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire, appearing as solicitor for the plaintiff and Charles F. Tew, Esquire, appearing as solicitor for the defendants. And thereupon, comes the evidence the hearing of which is continued to the hour of adjournment.

(Record Entry of Hearing, Sept. 3, 1913.)

Before JUDGE LEWIS.

156 This cause comes on now to be further heard upon the application for a temporary injunction, Clayton, C. Dorsey, Esquire, appearing as solicitor for the plaintiff and

Charles F. Tew, Esquire, appearing as solicitor for the defendants. And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

Affidavit of George G. Holcomb for Complainant.

State of Colorado,
City and County of Denver—ss.

George G. Holcomb, of the city of Omaha, county of Douglas, state of Nebraska, of lawful age, upon his oath says:

That he is now and has been for more than eight years last past Special Agent and Asst. Tax Commissioner of the Tax Department of Union Pacific Railroad Company, with offices at Omaha, Neb.; that he has made a special investiga-
157 tion of all of the records in the office of the Clerk and Recorder of the County of Weld, State of Colorado, for the purpose of obtaining data showing all sales of lands in said county from the first day of January, 1909, up to and including the 23d day of August, 1910, with the exception that he has excluded from said data and list of sales or transactions prepared by him all sales or transactions in which the consideration was apparently fictitiously stated, such transactions involving trades and transactions other than bona fide sales;

That he has placed on said list under proper headings description of the lands by section, township, range, acreage, date of sale, book and page number of the records, and consideration paid therefor, and said list has been marked "Exhibit A", and is attached hereto for incorporation herein to be read as a part hereof; that during the entire period covered by said list many transactions are recorded showing failure to recite the full consideration in the deed, such deeds reciting a consideration of one (1) dollar and other good and valuable considerations; that such sales have been omitted from this list;

That the aggregate sales values as shown by the sales of land in said county on Exhibit A attached hereto is the sum of four million four thousand, eight hundred and sixty-seven dollars ($4,004,867.00);

158 Affiant further states that the data appearing on said Exhibit A attached hereto is correctly transcribed from the records of Weld County, Colorado; and

Affiant further states that he has conducted an inquiry and investigation to verify a portion of the considerations named in the recorded sales listed in Exhibit B attached hereto; that

in making said inquiry and investigation affiant has in most cases personally interviewed the grantors or grantees named in the deeds, or parties interested in the sales who knew the actual consideration which passed thereat that affiant has verified the considerations mentioned in the deeds to all of the lands listed upon a certain exhibit attached hereto marked "Exhibit B"; that said Exhibit B contains a description of the lands conveyed by said deeds, the date of the signing of said deeds and the considerations indicated therein;

Further affiant saith not.

GEORGE G. HOLCOMB.

Subscribed and sworn to before me this 6th day of August, A. D. 1913. My commission expires January 17th, 1918.

(Notarial Seal) JOHN A. BENNEWITZ,
Notary Public.

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EXHIBIT A.

159 STATEMENT SHOWING RECORDED SALES OF LANDS IN WELD COUNTY, COLORADO.

From January 1st, 1909, to August 23rd, 1910, with consideration, and with assessed valuation of the same parcels for the year 1910 & 1912.

Part of Section	Section	Township	Range	Acres	Date Sold	Book & Page		Consideration	Assessed Valuation 1910	Assessed Valuation 1912
W½ NW¼	21	6	66	80	1-2-09	292	15	$ 4,000	$1,050	$1995
Part	24	6	64	341	1-2-09	"	30	14,660	3,680	2184
W½ SE¼	24	8	66	80	1-4-09	"	31	4,500	950	900
W½ NE¼	7	2	68	80	1-8-09	"	65	10,500	1,760	1790
NW¼	6	7	65	174	1-8-09	"	75	19,140	4,140	4984
W½ NE¼	36	2	67	80	1-5-09	"	96	8,500	1,600	1950
W½ NW¼	31	2	66	80	1-5-09	"	97	8,000	600	700
NE¼ SE¼	10	2	65	40	1-11-09	"	107	600	170	170
SW¼ SE¼; SE¼ SW¼; W½ SW¼	32	8	65	159	1-14-09	"	123	16,000	3,730	3712
S½ SE¼	35	6	65	80	1-16-09	"	130	17,000	3,370	3620
SE¼	14	6	67	160	1-14-09	"	136	12,000	3,000	3,000
SE¼ SE¼	20	8	66	40	1-18-09	"	140	1,000	130	170
NE¼	20	4	66	160	1-5-09	"	157	11,000	2,600	2600
S½ NW¼	10	7	65	80	1-14-09	"	159	8,500	1,700	1800
NE¼	35	3	67	160	1-19-09	"	162	7,500	1,900	1860
SW¼	13	11	63	160	1- 5-09	"	166	1,920	160	320
SE¼	1	8	66	160	1-26-09	"	168	4,000	320	480
SE¼ NE¼	20	2	66	40	1-22-09	"	173	3,900	950	800
SW¼ NW¼	22	5	65	40	1-23-09	"	190	4,000	660	510
E½ SW¼ SW¼	11	5	65	20	1-24-09	"	211	4,000	600	700
All	11	11	62	640	1-23-09	"	217	4,320	640	640
W½ NE¼	33	6	61	80	1-27-09	"	232	7,050	1,630	1750
NW¼	13	11	63	160	1- 5-09	"	233	1,920	160	160

All	1	7	64	639	1-15-09	"	254	11,517	1,920	1920
NE¼	5	5	64	160	2- 1-09	"	263	16,000	3,280	3262
N½ NW¼; N½ S½ NW¼	18	7	65	100	2- 1-09	"	267	15,000	3,150	3106
W½ NW¼	10	7	65	80	1-25-09	"	283	8,000	1,800	1800
SW¼	24	4	68	160	1-11-09	"	285	8,000	2,320	3300
W½	21	6	63	320	1-30-09	"	287	6,720	960	960
E½ SW¼; SW¼ NW¼ and NW¼ NW¼	26 35	6	66	160	1-27-09	"	288	15,000	2,750	3210
NE¼	15	8	63	160	2-4-09	"	309	3,200	320	480
E½ NW¼	20	7	67	80	2-1-09	"	316	7,500	1,475	1900
SW¼ SE¼; SE¼ NW¼&E½ SW¼ NW¼ SE¼	32	6	66	200	2-6-09	"	327	12,000	2,400	2120
E½ SE¼	24	8	66	80	2-6-09	"	333	3,100	500	575
SE¼	32	8	66	160	2-6-09	"	335	5,600	1,300	1540
S½ NW¼	32	2	66	80	2-6-09	292	338	6,000	700	928
E½ NW¼; W½ NE¼	12	3	67	160	2-8-09	"	340	4,300	1,100	1,150
All	29	7	63	640	1-29-09	"	343	12,800	1,920	1,920
SW¼	31	8	64	160	1-5-09	"	344	4,500	320	480
E½ SW¼	17	7	66	80	2-9-09	"	346	8,200	1,750	1,800
E½ SW¼	22	5	65	80	2-9-09	"	352	5,500	800	815
SW¼ NE¼	10	4	67	40	1-30-09	"	356	5,400	700	670
S½ NW¼	34	1	65	80	1-26-09	"	366	2,500	160	240
All	15	8	64	640	1-29-09	"	382	9,600	1,920	1,920
NW¼	25	1	64	160	1-18-09	"	383	3,200	320	320
N½ NE¼	10	7	65	80	1-19-09	"	391	9,000	1,900	1,800
SW¼ NW¼	11	5	65	40	2-11-09	"	417	2,500	500	500
SE¼ NE¼; NE¼ SE¼	21	2	64	80	2-18-09	"	429	1,600	160	160
W½ SW¼	11	4	67	80	1-26-09	"	440	9,500	2,030	2,275
NE¼ & N½ SE¼	22	1	65	240	2-20-09	"	453	4,800	480	480
E½ SW¼	10	6	67	80	2-23-09	"	464	4,000	850	240
All	27	9	64	640	2-19-09	"	465	5,120	1,280	1,280
S½	35	10	67	320	1-5-09	"	466	4,800	840	840

Part of Section	Section	Township	Range	Acres	Date Sold	Book & Page		Consideration	Assessed Valuation 1910	Assessed Valuation 1912
E½ SE¼	8	2	66	80	1-5-09	"	467	$6,000	$1,550	$1,240
E½ NE¼	34	11	62	80	1-7-09	"	468	1,700	80	80
All	17	7	64	640	2-25-09	"	484	12,160	3,200	3,200
NW¼	12	6	67	160	3-1-09	"	502	17,000	4,100	4,100
SE¼	9	1	66	160	3-1-09	"	506	2,000	320	480
SE¼	23	2	64	160	1-25-09	"	519	4,000	320	320
NE¼	23	2	64	160	1-25-09	"	520	4,000	320	320
N½ NE¼	27	5	65	80	3-1-09	"	535	10,000	1,630	1,750
All 7, 17, 19 and	21	5	62	2560	2-10-09	"	550	51,200	2,560	2,560
S½ SW¼	3	5	64	80	3-6-09	"	556	8,000	1,350	2,050
E½	23	6	64	320	2-16-09	"	572	10,000	2,260	2,815
N½ NE¼	36	2	67	80	1-5-09	292	585	8,500	1,600	1,950
NW¼ NW¼	27	5	65	40	3-9-09	300	2	6,500	820	1,030
N½ NE¼	32	5	65	80	2-27-09	"	6	4,000	400	400
E½	17	8	65	320	3-4-09	"	39	10,800	3,060	2,420
W½ NW¼	3	8	66	76	2-11-09	"	44	3,350	630	630
All 23 and	27	1	63	1280	2-26-09	"	59	20,480	2,560	3,840
SW¼	27	2	62	160	3-15-09	"	94	1,600	260	320
SE¼	6	6	64	160	1-26-09	"	116	11,000	1,740	2,550
N½ SW¼ and SW¼ SW¼	21	5	65	120	3-20-09	"	117	3,250	920	816
NE¼	8	2	65	160	2-4-09	"	122	1,600	320	320
All	27	11	65	640	3-22-09	"	124	4,800	640	640
Part NE¼	33	5	65	104	3-20-09	"	125	14,900	2,480	3,500
NW¼	14	4	64	160	3-20-09	300	126	2,400	320	320
NE¼	23	2	64	160	3-27-09	"	127	3,840	320	320
SE¼	34	11	62	160	3-20-09	"	130	3,200	520	320
NE¼ NE¼	30	1	66	40	3-20-09	"	133	3,600	880	120

SW¼	23	11	63	160	1-5-09	"	154	1,920	160	240
N½	23	11	63	320	1-5-09	"	155	3,840	320	320
All	31	6	63	640	3-25-09	"	160	11,280	2,120	3,228
SW¼	24	1	68	141	3-20-09	"	162	15,000	1,600	800
NE¼	13	11	63	160	1-5-09	"	168	1,920	160	310
SE¼	23	11	63	160	1-5-09	"	169	1,920	160	160
SE¼	15	11	63	160	1-5-09	"	170	1,850	160	160
NW¼	5	5	66	160	3-19-09	"	211	12,000	2,080	2,040
E½ NW¼	30	3	67	80	3-19-09	"	213	8,000	1,560	1,570
W½ NE¼	32	6	67	80	3-30-09	"	219	5,000	350	720
SE¼	23	2	64	160	3-19-09	"	223	4,800	320	320
All	9									
W½	15									
All	17									
NW¼ and S½ SW¼	10	6	62	1,840	3-19-09	"	225	11,750	2,020	2,020
N½ SW¼ and W½ SE¼	10	6	62	160	3-19-09	"	226	1,000	160	160
NW¼	13	1	65	160	3-11-09	"	229	4,000	320	480
All	29									
W½	27									
All	31 & 33		62							
"	5									
NW¼	3									
All	9									
NE¼ NE¼	17	4	62	3,914	3-19-09	"	237	86,108	3,880	3,880
SE¼	23	8	66	160	3-10-09	"	272	8,000	1,400	760
N½ NE¼	14	5	64	80	3-11-09	"	281	8,900	1,450	1,445
SE¼; E½ SW¼	8	3	68	240	4-1-09	"	310	19,000	4,560	4,360
SE¼	9	7	66	160	4-8-09	"	312	13,500	3,940	3,430
SW¼	5	10	63	160	4-3-09	"	313	962	160	160
NE¼	13	4	67	160	3-27-09	"	319	15,000	2,600	2,451
W½ SW¼	24	4	61	80	3-22-09	"	338	2,500	690	690

Part of Section	Section	Township	Range	Acres	Date Sold	Book & Page		Consideration	Assessed Valuation 1910	Assessed Valuation 1912
N½ NE¼	27	5	65	80	4-1-09	"	344	$10,500	$1,630	$1,750
S½ SW¼	3	5	64	80	4-8-09	"	346	8,000	1,350	1,250
SE¼	18	7	67	160	4-14-09	"	360	12,000	2,620	3,180
N½ NE¼	28	2	66	80	4-2-09	"	362	7,000	1,420	1,320
NW¼	34	1	68	160	3-20-09	"	379	4,400	480	1,600
N½ SE¼	12	9	67	80	4-14-09	"	396	1,250	210	210
S½ SE¼	12	9	67	80	4-14-09	300	397	1,350	210	260
NE¼	20	8	66	160	4-19-09	"	40	3,600	480	480
S½ NE¼	3	1	67	80	4-10-09	"	404	8,000	1,630	1,530
NW¼ NE¼	28	7	65	80	4-20-09	"	415	5,000	1,070	920
All 19 and	29	10	63							
" 15 "	23	10	64	2563	4-6-09	"	433	57,674	4,560	2,560
W½ NW¼	23	2	63	80	4-17-09	"	443	1,600	160	160
SW¼ SW¼	7	5	66	40	4-24-09	"	465	800	120	480
All	27	7	64	640	2-23-09	"	476	12,800	960	1,920
N½ NE¼	28	2	66	80	4-22-09	"	491	7,000	1,420	1,320
E½ SE¼	24	8	66	80	5-1-09	"	502	2,850	500	575
NW¼	31	11	60	160	3-19-09	"	509	2,000	160	160
N½ SE¼	20	8	66	80	4-28-09	"	518	1,925	240	240
NW¼	32	8	57	160	5-5-09	"	547	1,000	160	160
E½	29	9	66	320	5-3-09	"	551	8,000	640	640
All	5	2	63	640	2-3-09	"	562	5,760	640	640
"	3	8	65	619	5-1-09	"	564	9,904	1,920	2,137
S½ SE¼	1	3	67	80	5-1-09	300	581	2,400	500	900
W½ SW¼	17	7	66	80	5-3-09	305	13	6,750	1,700	1,700
SE¼	3	11	63	160	4-6-09	"	25	1,920	320	160
S½ SW¼	34	5	64	80	5-17-09	"	34	1,600	160	240
NE¼	17	11	63	160	4-6-09	"	39	1,920	160	160

N½ NW¼	36	–	67	80	4-15-09		43	14,000	2,400	5,575
All	31	9	66	640	5-14-09	"	44	8,000	1,280	1,280
SE¼	5	11	63	160	4-6-09	"	49	1,920	160	160
All	35	8	67	640	5-15-09	"	72	16,000	1,280	1,920
NE¼ of SE¼	6	5	64	40	5-26-09	"	80	1,050	200	720
All	6	10	61	655	5-27-09	"	94	10,480	2,120	1,520
All	19	8	66	678	5-29-09	"	124	8,824	2,340	2,340
S½	10	11	64	320	3-23-09	"	130	3,120	940	580
NE¼	26	3	68	160	6-2-09	"	131	16,000	4,400	4,400
NE¼	4	2	65	160	6-1-09	"	133	2,278	580	580
NE¼ SW¼	14	5	65	40	5-27-09	"	139	3,500	550	510
N½ NW¼	3	7	65	80	6-1-09	"	140	7,500	1,620	1,560
NW¼	12	4	66	160	6-8-09	"	154	20,000	2,120	2,500
SW¼	9	10	63	160	6-9-09	"	161	1,680	160	160
NW¼	15	11	62	160	5-24-09	"	163	2,400	160	160
E½ NW¼	23	6	66	80	6-5-09	"	171	10,000	2,430	2,430
W½	22	3	65	320	6-7-09	"	182	5,120	640	640
SW¼	26	1	65	160	5-27-09	"	183	4,000	420	530
NE¼	15	11	62	160	5-29-09	"	187	2,400	160	160
All	9	8	63	640	6-10-09	"	189	16,000	1,920	1,920
All	33	2	67	640	5-25-09	305	226	18,000	1,920	3,350
NW¼	33	8	66	160	6-9-09	"	238	16,000	1,750	2,400
SE¼	11	1	67	160	6-15-09	"	259	10,000	2,270	2,420
SW¼	5	11	63	160	5-13-09	"	267	1,920	160	160
SW¼	12	11	64	160	6-15-09	"	270	1,680	160	160
SE¼	33	1	68	160	6-8-09	"	279	8,000	800	480
N½ SE¼	11	1	67	80	6-25-09	"	284	7,000	1,220	1,450
W½ SE¼; S½ NE¼; SW¼ & N½ NE¼	32	2	65	400	1-27-09	"	290	25,500	3,500	3,760
NE¼	31	7	67	160	4-8-00	"	312	1,400	480	680
NE¼	34	2	63	160	6-30-09	"	319	4,800	320	320

Part of Section	Section	Township	Range	Acres	Date Sold	Book & Page	Consideration	Assessed Valuation 1910	Assessed Valuation 1912
NW¼	6	4	63	148	6-5-09	" 336	$ 9,000	$1,390	$1,390
SE¼	7	11	62	160	6-12-09	" 344	1,360	160	160
NE¼	3	6	65	160	6-14-09	" 340	20,700	5,050	5,300
All	25	8	67	640	6-23-09	" 350	11,520	1,280	1,920
NW¼	14	8	66	160	7-1-09	" 358	5,000	900	900
SW NW¼	11	4	66	40	6-30-09	" 361	4,000	120	120
SE¼	22	3	65	160	7-12-09	" 367	2,560	320	320
SE¼	14	5	67	160	6-19-09	" 381	5,000	630	480
All	25	9	67	640	6-24-09	" 393	11,200	1,920	1,920
S½ SE¼	11	1	67	80	6-25-09	" 418	4,000	1,050	970
All	31	9	66	640	7-22-09	" 431	15,000	1,280	1,280
NW¼	10	3	63	160	7-15-09	" 432	1,760	160	240
SW¼	19	3	63	160	7-15-09	" 433	1,760	160	320
W½ NE¼	6	5	64	80	7-27-09	" 450	5,000	1,000	1,005
All	21	3	65	640	7-29-09	" 458	11,520	1,280	1,280
All	29	3	65	640	7-29-09	" 466	6,400	1,280	1,280
SW¼	10	3	65	160	7-31-09	" 467	5,000	1,640	960
NW¼	34	2	63	160	6-30-09	" 473	4,800	260	400
S½	11	3	65	320	8-5-09	" 482	6,400	640	640
S½	15	11	62	320	7-16-09	" 485	5,120	320	320
SE¼	6	6	64	160	8-7-09	" 486	14,500	1,740	2,550
NE¼	2	1	68	159	8-5-09	" 506	14,500	1,400	1,500
All	17	6	67	640	8-11-09	" 507	3,520	1,280	1,280
All	27	7	64	640	8-9-09	" 540	16,000	960	1,920
NE¼	22	3	65	160	7-31-09	" 556	2,400	160	320
All 23 &	15	8	65	1280	8-20-09	" 564	45,000	5,030	5,330
NW¼	5	8	65	160	8-7-09	" 566	4,000	480	480
E½	18	4	67	320	8-17-09	" 573	34,000	7,190	7,630

E½ NE¼	30	2	66	80	8-23-09	"	582	3,450	620	560
NW¼	19	11	63	160	8-10-09	511	27	1,920	160	160
W½ SW¼	26	4	68	80	8-13-09	511	37	2,540	600	840
N½ NW¼	32	2	66	80	8-5-09	"	44	8,000	1,000	990
NW¼	23	11	62	160	8-18-09	"	45	3,520	160	320
All	35	8	67	640	9-3-09	"	50	18,000	1,280	1,920
SW¼	23	11	62	160	8-18-09	"	60	3,520	160	320
NW¼	17	11	62	160	7-12-09	"	62	1,760	160	160
W½	26	2	67	320	9-2-09	"	64	12,000	1,800	1,800
SE¼	18	3	64	160	8-30-09	"	65	4,000	260	420
E½	23	7	65	320	8-31-09	"	66	7,360	960	960
SE¼	2	3	65	160	9-8-09	"	77	3,200	320	320
E½ SE¼	17	11	62	80	7-13-09	"	94	800	160	80
W½ SE¼	17	11	62	80	7-13-09	"	95	800	200	80
W½ SW¼ SE¼ SW¼ & NE¼	2 10									
S½	3	4	63	600	9-13-09	"	109	50,000	3,330	3,330
N½; SE¼ SW¼	11	5	65	20	9-13-09	"	114	3,500	700	700
S½ & NW¼	15	1	63	480	9-2-09	"	127	7,200	960	1,120
NE¼	18	2	65	160	9-9-09	"	131	2,880	320	480
All	17	2	65	640	9-1-09	"	135	15,000	3,400	2,120
NE¼	26	5	67	160	9-14-09	"	145	2,880	480	480
SE¼	5	1	65	160	9-15-09	"	146	12,800	1,500	2,000
SE¼	21	9	66	160	9-10-09	"	167	3,200	320	320
N½	31	6	67	320	9-24-09	"	184	11,600	1,060	1,060
All	3	8	63							
W½ and SE¼	1	8	63							
SW¼	7	8	62	1280	9-23-09	"	205	38,400	3,680	3,680
E½ NW¼	8	3	67	80	8-3-09	"	227	8,000	1,500	1,500
SE¼	30	6	64	160	10-1-09	"	232	20,000	2,950	2,950
All	13	8	63	640	10-2-09	"	236	9,600	1,920	1,920

Part of Section	Section	Township	Range	Acres	Date Sold	Book & Page		Consideration	Assessed Valuation 1910	Assessed Valuation 1912
SW¼	4	1	65	160	9-12-09	"	251	$16,000	$2,600	$2,400
SE¼	17	11	63	160	9-24-09	"	254	1,920	240	160
S½ SE¼	21	8	65	80	9-21-09	"	260	3,500	440	1,400
All	3	11	64	640	9-18-09	"	267	8,900	640	640
NW¼	6	7	67	160	9-18-09	"	271	8,000	1,790	1,830
SE¼	4	7	65	160	9-9-09	"	276	8,000	800	800
SW¼	14	8	66	160	10-2-09	"	280	3,300	580	580
NW¼	14	8	65	160	10-2-09	"	281	6,000	660	580
S½	9	7	67	320	10-9-09	"	297	20,000	1,800	5,400
SE¼ NE¼ 21 and W½ SW¼	22	5	65	120	10-13-09	"	325	7,500	1,030	1,120
NE¼	32	8	66	160	10-4-09	"	334	5,000	930	580
SW¼	19	11	63	160	10-4-09	"	385	1,920	160	160
W½ SE¼	2	2	67	80	10-27-09	"	392	6,500	1,345	1,210
NW¼	14	10	61	160	8-28-09	"	398	1,100	160	160
SE¼	10	3	65	160	11-1-09	511	418	4,000	320	960
NE¼	29	7	64	160	11-5-09	"	468	6,400	1,600	1,800
NE¼	18	6	63	160	10-15-09	"	473	8,000	530	530
NE¼	13	7	63	160	11-8-09	"	477	4,800	480	480
SE¼	23	9	66	160	11-8-09	"	480	9,000	1,200	960
W½ SW¼	10	8	65	80	10-29-09	"	483	3,200	400	400
E½ NE¼ and SW¼ NE¼	7	5	67	120	11-14-09	"	516	8,000	1,240	1,471
SW¼	10	2	65	160	10-26-09	"	518	2,500	320	420
NE¼	29	4	67	160	11-15-09	"	519	22,000	2,410	2,955
NW¼	4	3	67	160	10-23-09	"	527	8,500	2,380	2,550
SE¼	31	9	65	160	11-19-09	"	545	4,000	820	320
NE¼	31	4	66	160	11-1-09	"	551	12,000	1,120	1,470
E½ SE¼	33	7	65	80	6-21-09	"	553	16,000	2,450	2,265
SW¼	33	9	60	160	11-16-09	"	569	2,080	320	260

W¼ NE¼	2	1	67	80	11-26-09	"	578	10,500	2,100	2,100
S½ NW¼	23	5	65	80	11-24-09	"	585	12,000	1,460	1,670
S½ NW¼	10	7	65	80	11-20-09	"	586	8,500	1,700	1,800
All	33	8	67	640	11-29-09	316	9	12,800	1,280	1,920
E½ NW¼	29	2	66	80	11-9-09	"	30	9,500	1,180	1,230
W½ NW¼	2	5	64	80	12-2-09	"	51	8,500	1,760	1,615
All	17	1	65	640	11-1-09	"	66	37,620	1,280	1,920
SE¼	6	8	65	160	11-30-09	"	67	5,600	580	930
NW¼	5	1	68	160	12-6-09	"	78	12,000	2,100	1,075
NE¼	18	6	64	160	12-1-09	"	99	16,500	3,160	3,160
All	9	9	66	640	12-6-09	"	103	19,000	2,490	2,295
"	6	10	61	640	12-3-09	"	104	16,375	2,120	1,580
SE¼ NE¼	20	2	66	40	12-9-09	"	111	4,500	950	800
S½	17	7	63	320	12-11-09	"	120	7,360	960	960
SW¼	28	8	66	160	12-11-09	"	121	5,600	1,100	2,070
NW¼	14	1	65	160	12-6-09	"	135	6,800	530	480
SE¼	19	7	67	160	12-6-09	"	147	16,000	2,620	2,620
NW¼	5	1	68	160	12-9-09	"	152	12,000	2,100	1,075
E½ SW¼	9	4	66	80	12-13-09	"	159	6,000	240	240
W½ SE¼	9	4	66	80	12-13-09	"	185	6,000	240	240
N½ SW¼	34	5	64	80	12-27-09	"	195	1,700	210	340
S½ SE¼	28	2	66	80	10-1-09	"	199	3,000	390	490
N½ NE¼	26	2	67	80	12-27-09	"	215	840	160	400
N½	23	8	66	320	12-29-09	"	220	12,800	1,600	1,600
NE¼	31	4	66	160	12-16-09	"	222	12,000	1,120	1,470
SE¼	6	6	64	160	9-24-09	"	223	15,000	1,740	2,550
S½ SE¼	6	5	66	80	12-31-09	"	245	9,000	1,350	1,515
N½ SE¼	6	5	66	80	12-31-09	"	246	9,000	1,350	1,515
SE¼	6	7	65	160	12-31-09	316	258	$20,000	$3,770	3,970
S½ SW¼	29	5	67	80	12-13-09	"	269	10,000	1,150	2,160
W½	12	4	64	320	1-6-10	"	275	10,000	640	640

Part of Section	Section	Township	Range	Acres	Date Sold	Book & Page	Consideration	Assessed Valuation 1910	Assessed Valuation 1912
E½ and SW¼	13	4	64	480	1-6-10	" 276	$10,000	$ 960	$ 960
NE¼	12	4	64	160	1-6-10	" 277	8,000	320	320
S½ SE¼	35	2	67	80	1-7-10	" 281	9,000	1,820	1,710
W½ SE¼	30	6	65	80	1-6-10	" 300	11,500	3,430	3,650
SE¼	20	6	64	160	7-20-09	" 317	8,000	1,820	2,500
NE¼	14	6	67	160	1-5-10	" 325	13,600	4,240	3,950
SE¼	14	1	65	160	12-22-09	" 329	3,600	320	468
W½ W½ NW¼	17	1	66	40	1-13-10	" 330	3,800	560	420
W½ NW¼	2	7	66	80	12-14-09	" 331	13,700	2,000	2,160
NW¼	19	8	65	160	12- -09	" 346	4,200	800	800
SW except 42 A	13	4	68	120	1-17-10	" 363	12,000	2,090	2,251
All Sec. 1-11 &	13	3	66	1920	12-31-09	" 366	24,060	1,920	3,840
All	9	8	65	640	12-28-09	" 367	24,000	1,920	1,600
SE	23	2	66	160	12-22-09	" 371	1,000	160	480
SE	21	10	62	160	11-8-09	" 375	1,600	260	160
SE	22	2	63	160	1-5 10	" 376	1,200	320	320
W½ NW	19	6	63	80	1-7-10	" 382	4,000	800	800
NE	21	2	66	160	12-16-09	" 388	1,600	530	530
N½ NW; SE NW	11	4	66	120	1-17-10	" 389	3,250	360	360
SW	15	4	67	160	8-15-09	" 394	15,000	1,180	1,740
All	35	4	65	640	1-24-10	" 404	20,000	1,920	1,920
NW	28	8	66	160	12-30-10	" 411	7,000	580	2,020
N½ SW	31	6	64	80	1-25-10	" 414	10,000	1,600	1,630
N½ NW	12	7	66	80	1-24-10	" 415	10,000	2,570	1,820
S½ NW	12	7	66	80	1-24-10	" 416	10,000	2,900	2,250
S½	31	11	60	320	11-26-09	" 419	3,000	320	320
E½ NW	22	3	67	80	1-20-10	" 432	2,500	240	800

S½ SE											
NE NE	11										
15 A -SE C SW SW	14	5	65	135	1-28-10	"	435	10,000	1,940	2,040	
S½ E½ NE	12										
N½	2	5	64	40	1-18-10	"	442	3,000	820	440	
SE SW	21		66	320	1-25-10	"	445	18,000	2,560	3,833	
NE	10	5	66	40	1-26-10	"	455	600	80	120	
NW	11	4	68	160	1-15-10	"	458	20,000	4,020	3,804	
NE	7	5	67	160	1-1-10	"	459	8,000	480	760	
E½ SE	5	3	68	160	2-1-10	"	471	8,000	2,870	2,900	
NE SW	12	6	64	80	2-1-10	"	483	5,000	1,110	1,226	
NE	16	5	65	40	2-1-10	"	484	8,000	1,000	1,000	
SW	5	1	65	160	12-20-09	"	488	12,800	1,800	1,800	
W½ NE	32	1	65	160	2-1-10	"	489	6,000	900	580	
SE	28	8	65	80	2-1-10	316	490	8,800	1,860	1,940	
N½ SW	29	4	68	160	2-3-10	"	492	15,000	3,230	3,860	
E½ SE	20	2	66	80	12-11-09	"	493	6,000	590	734	
NE SE	20	6	63	80	1-4-10	"	499	5,000	1,100	780	
SW	10	4	68	40	2-1-10	"	503	2,500	630	630	
NE	15	7	65	160	2-1-10	"	504	18,000	3,080	3,030	
NW	5	5	66	160	2-1-10	"	508	11,500	1,530	2,200	
NE NE	8	7	66	160	2-1-10	"	509	15,000	2,360	2,750	
E½ SW	10	5	66	40	12-16-09	"	513	4,500	830	610	
SW	1	7	66	80	2-1-10	"	529	10,000	2,060	2,034	
E½	8	8	65	160	1-3-10	"	535	8,000	1,660	2,245	
E½ N½; NW N½; S½ NW - Se SE NW	1	7	63	320	2-1-10	"	544	8,380	840	840	
E½ E½ SW	1	5	67	490	2-10-10	"	546	20,000	4,200	4,850	
SW	8	2	65	160	2-10-10	"	551	2,700	320	420	
SW	13	6	67	160	2-11-10	"	556	15,000	4,000	3,826	
S½	17	6	64	320	2-14-10	"	573	34,400	5,400	5,000	
E½ Se; SE NE	8	2	68	120	2-17-10	"	583	6,500	1,200	1,300	

Part of Section	Section	Township	Range	Acres	Date Sold	Book & Page	Consideration	Assessed Valuation 1910	Assessed Valuation 1912
E½ SE	29	2	66	80	2-16-10	325 6	$ 8,500	$1,530	$1,270
E½ NW	3	7	66	80	12-31-09 "	7	14,000	1,910	1,910
All	33	7	64	640	2-14-10 "	12	20,000	2,800	1,937
NE	21	2	66	160	2-19-10 "	19	5,000	530	530
NW	6	4	68	160	2-14-10 "	37	22,000	2,640	2,449
SW5- N½ NW 8- E½ SE	6	2	66	320	2-19-38 "	38	32,000	4,730	5,340
NE	28	7	66	160	2-23-10 "	40	16,750	3,460	3,574
SW NE	19	5	67	40	2-24-10 "	45	5,000	560	1,060
S½ NW	30	5	67	80	2-24-10 "	46	5,000	1,370	1,400
N½ NW	30	5	67	80	2-24-10 "	47	5,500	840	1,140
S½ SE	19	4	66	80	2-21-10 "	52	5,200	1,060	1,120
NW	4	4	68	160	2-7-10 "	55	10,500	3,220	3,120
NE	22	5	66	160	2-1-10 "	56	16,000	3,120	2,480
E½ NW	33	6	64	80	2-21-10 "	58	10,500	1,750	1,750
SW	18	5	66	160	12-15-09 "	61	2,250	770	770
SW	20	3	66	160	2-21-10 "	62	4,500	480	580
NE NE	10	5	66	40	2-18-10 "	63	5,000	830	610
S½ SW	34	5	64	80	2-28-10 "	79	1,500	160	240
N½ SE	10	2	68	80	2-15-10 "	80	4,500	740	1,040
S½ SE	18	6	64	80	2-28-10 "	81	11,000	1,630	1,730
All	1	3	66	640	12-31-09 "	93	25,600	640	1,280
NW	19	3	68	160	3-1-10 "	95	18,400	3,200	4,140
W½ NW	29	3	68	80	2-14-10 "	104	10,330	2,030	1,910
NW	5	6	67	160	3-2-10 "	105	25,000	2,080	2,120
NW & W½ NE	4	3	66	240	3-4-10 325	107	11,000	2,470	3,125
N½ NW	35	6	65	80	3-1-10 "	109	18,000	4,180	4,400
NE	10	10	61	160	2-17-10 "	110	2,720	320	160
SW	10	10	61	160	2-17-10 "	111	2,720	320	160

W½ SE	28	6	65	80	3-5-10	"	119	22,000	4,800	4,400
NW	35	8	66	160	3-7-10	"	126	16,000	2,400	2,560
N½	5	9	67	320	2-23-10	"	129	4,960	640	670
SW	5	9	67	160	2-23-10	"	130	2,480	320	320
W½	35	11	62	320	3-5-10	"	138	10,240	1,350	1,220
NW	6	3	66	160	3-1-10	"	159	8,000	1,740	1,580
NW	22	5	67	160	1-28-10	"	160	5,000	900	850
SE SW & E½ SW SW	17	1	66	60	3-9-10	"	164	8,250	1,490	1,342
NE NW & E½ NW NW	20	1	66	60	3-9-10	"	166	7,400	1,100	986
N½ SE & N½ SW	4	3	68	160	3-9-10	"	169	20,000	3,670	4,000
N½	29	9	67	320	1-27-10	"	170	3,360	640	1,180
S½	29	9	67	320	1-27-10	"	173	3,360	[illegible]	1,030
E½	5	10	65	320	3-5-10	"	176	3,200	320	640
S½ SE	20	2	66	80	3-9-10	"	183	10,500	2,130	2,332
NW	5	1	68	160	3-2-10	"	185	12,800	2,100	1,075
W½ SE	34	1	66	80	3-11-10	"	186	1,000	210	240
NE	19	2	64	160	3-7-10	"	198	4,000	320	320
W½ SE	8	2	66	80	3-3-10	"	199	6,500	1,820	1,660
E½ SW	27	4	66	80	3-12-10	"	200	10,000	900	1,110
E½ E½ SW	34	6	65	40	3-12-10	"	202	8,500	1,730	2,400
All	19	9	64	640	1-12-10	"	203	5,000	1,280	1,280
S½ SE	23	5	65	80	3-17-10	"	214	14,000	2,100	2,100
W½ NE	5	7	65	80	1-25-10	"	224	7,500	800	1,200
W½ SE	32	6	64	80	3-5-10	"	226	9,250	1,700	1,666
SW	33	9	60	160	3-6-10	"	234	2,880	320	260
NE	1	4	61	160	3-19-10	"	247	6,400	260	370
W½ SE	10	2	67	80	1-10-10	"	253	2,000	800	800
E½ SE	10	2	67	80	1-10-10	"	254	2,000	800	800
W½ SW	32	8	65	80	3-22-10	"	261	8,500	1,730	1,732
W½ NE	30	6	65	80	3-20-10	"	293	23,000	4,400	4,400
E½ NE	4	3	66	80	3-14-10	"	307	5,500	420	610

Part of Section	Section	Township	Range	Acres	Date Sold	Book & Page	Consideration	Assessed Valuation 1910	Assessed Valuation 1912
W½ NW	22	3	67	80	2-31-10	" 313	$ 6,000	$1,000	$1,160
E½ NW & W½ NE	21	6	65	160	4-1-10	" 314	38,000	7,100	8,400
SE	23	8	60	160	3-25-10	" 311	1,280	160	210
SW	35	11	61	160	3-26-10	" 329	1,600	320	320
SE	32	8	67	160	3-31-10	" 349	1,600	420	530
N½ SE	1	3	67	80	3-16-10	" 350	5,000	1,100	1,000
SW NE	9	3	68	40	3-28-10	325 353	5,500	$990	995
N½ SW	25	2	67	80	4-7-10	" 363	2,500	850	620
N½ NE	9	1	66	80	4-8-10	" 364	2,000	320	480
NW	18	5	67	160	2-27-10	" 365	25,000	4,350	4,351
W½ Ne	4	4	65	80	3-1-10	" 370	10,000	1,350	1,350
SE	25	2	63	160	3-18-10	" 376	6,400	320	320
S½ NW	32	2	66	80	3-23-10	" 378	2,400	700	928
NE	7	4	68	160	3-7-10	" 379	18,500	3,400	3,480
W½	13	8	66	320	4-12-10	" 413	11,200	1,600	960
W½ SE	20	6	63	80	4-13-10	" 418	4,000	1,200	625
E½ NW	21	6	65	80	4-1-10	" 431	21,000	3,800	4,200
S½ NW & N½ SW & S½ SW	6	1	68	240	4-18-10	" 433	12,500	1,200	1,200
W½ SW½ & W½ NW	11	10	62	160	4-15-10	" 434	1,800	240	320
E½ SE	32	1	66	80	4-14-10	" 452	2,400	400	1,150
All	7	7	62	640	4-15-10	" 453	16,000	1,280	1,280
N½ NW S½ SW	16 9	6	67	160	4-21-10	" 454	10,500	4,170	2,632
N½ SE	19	4	66	80	4-21-10	" 465	8,000	900	1,060
SW	20	3	64	160	4-8-10	" 468	4,800	420	420
SE	6	4	68	160	4-23-10	" 470	6,400	1,160	1,080
E½ SE	3	5	64	80	3-19-10	" 479	7,000	1,180	1,180
SE	7	11	62	160	3-24-10	" 480	2,240	160	160

S½	3	8	65	320	4-23-10	"	493	10,000	980	1,177
N½ SE	33	1	68	80	4-22-10	"	498	8,000	400	240
SE	33	11	62	160	4-23-10	"	513	2,000	160	160
SW	33	11	62	160	4-23-10	"	514	2,000	160	160
NW	35	11	61	160	3-26-10	"	528	1,600	320	160
E½ SE	16	4	66	80	3-17-10	"	532	8,000	1,160	1,160
NW	33	11	62	160	4-23-10	"	542	2,000	160	160
N½ SE & SW SE	4	3	67	120	2-11-10	"	550	8,000	2,160	2,160
S½ SE	33	1	68	80	4-30-10	"	575	8,000	400	240
SE	19	2	64	160	4-7-10	"	587	4,000	320	320
NE	28	1	66	160	5-14-10	330	18	5,000	480	480
W½ SE	18	4	65	80	4-3-10	"	25	6,000	1,800	1,800
NE	35	11	61	160	3-26-10	"	26	1,600	320	320
SE	25	4	68	160	5-16-10	"	27	15,000	2,010	2,460
S½	21	12	59	320	4-8-10	"	40	2,560	320	320
NE	33	11	62	160	4-22-10	"	64	2,560	160	160
N½ SE	7	4	66	80	5-21-10	"	69	5,500	240	800
NW	21	6	64	160	5-23-10	"	70	9,250	800	1,000
NW	4	2	67	160	5-7-10	330	75	10,000	800	1,140
SW	4	2	67	160	5-7-10	"	76	10,000	1,350	1,450
S½ SE	35	6	65	80	5-24-10	"	88	17,000	2,870	3,620
S½ SE & E½ SW	7	2	66	160	5-5-10	"	89	9,500	1,770	2,065
W½ SW	15	6	67	80	4-25-10	"	115	8,500	400	1,600
SE	3	11	62	160	5-16-10	"	163	2,240	160	160
(SE SW & SW SE	20									
E½ NW & W½ NE	29	2	68	240	6-1-10	"	168	18,000	2,800	1,810
S½ NW	27	2	62	80	5-19-10	"	174	1,600	130	160
NW	6	3	67	160	6-2-10	"	192	14,000	2,120	3,400
SE	8	9	61	160	5-31-10	"	207	3,500	260	160
E½ NE	18	1	66	80	6-1-10	"	210	8,500	820	1,720
NW	26	1	63	160	3-19-10	"	216	3,200	320	480

Part of Section	Section	Township	Range	Acres	Date Sold		Book & Page	Consideration	Assessed Valuation 1910	Assessed Valuation 1912
S½ SE	14	1	65	80	5-21-10	"	228	$ 4,000	$ 160	$ 240
W½	23	2	66	320	5-11-10	"	250	3,520	640	960
W½	29	12	62	320	5-18-10	"	253	4,800	640	640
W½ NE	23	7	67	80	4-28-10	"	263	5,000	1,630	1,664
W½ SE	14	8	66	80	7-7-10	"	289	2,280	240	400
SE	35	11	61	160	7-12-10	"	305	1,800	320	320
All	9	4	63	640	7-13-10	330	314	15,000	1,280	1,280
SW	35	11	61	160	7-23-10	"	335	2,000	320	320
N½ NW	31	5	67	80	7-21-10	"	352	8,000	1,870	2,015
NE	7	7	58	160	7-27-10	"	355	2,000	160	160
S½ NE & N½ SE	28	2	66	160	7-25-10	"	356	12,000	2,140	2,410
S½ SE & SE SW	34	8	58	120	7-22-10	"	362	2,400	360	120
NE	10	1	62	160	7-28-10	"	384	2,000	260	420
S½ SW	6	4	65	8	7-12-10	"	392	8,000	830	891
SW	17	2	66	160	8-12-10	"	427	4,500	780	680
W½ NE	6	5	64	80	3-10-10	"	432	6,500	1,000	1,005
E½ NE	26	4	68	80	8-19-10	"	434	4,000	340	790
NE	31	4	66	160	8-19-10	"	438	8,000	1,120	1,470
SW NW	22	5	65	40	8-22-10	"	449	3,200	660	510
N½ SE	6	8	66	80	8-23-10	"	456	1,200	400	400

Grand total valuation $4,004,867. Assessed 1910 $609,100 per cent 15.21

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Assessed 1912 $651,351 per cent 16.26

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Exhibit B.

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Part of Section	Section	Township	Range	Date Filed	Deed Consideration	Assessed Valuation 1912
N½ NW¼	12	7	66	1-25-10	$10,000.00	$1,820
S½ NW¼	12	7	66	1-25-10	10,000.00	2,250
SW¼	15	7	65	2-5-10	18.000.00	3,030
N½ NW¼	3	7	65	6-5-09	7,500.00	1,560
NE¼	29	7	64	11-8-09	6,400.00	1,800
NW¼	3	6	65	7-12-09	20,700.00	5,600
E½ SE¼	33	7	65	11-23-09	16,000.00	2,290
SE¼ SW¼ & E½ SW¼ SW¼	17	1	66	3-9-10	8,250.00	1,342
NE¼ NW¼&E½ NW¼ NW¼	20	1	66	3-9-10	7,400.00	986
N½	21	1	66	1-25-10	18,000.00	2,910
E½ SE¼	32	1	66	4-14-10	2,400.00	1,180
E½ NW¼-W½ NE¼	21	6	65	4-1-10	38,000.00	8,400
E½ NW¼	21	6	65	4-.-10	21,000.00	4,200
S½ SE¼	18	6	64	2-28-10	11,000.00	1,730
NE¼	18	6	64	12-8-09	16,500.00	3,160
NW¼	21	6	64	5-23-10	9,250.00	1,000
W½ SE¼	33	6	64	3-21-10	9,250.00	1,666
S½ SE¼	35	6	65	5-24-10	17,000.00	3,620
N½ NW¼	35	6	65	3-3-10	18,000.00	4,400
E½ E½ SW¼	34	6	65	3-12-10	8,500.00	2,400
W½ SE¼	28	6	65	3-5-10	22,000.00	4,400
W½ NE¼	30	6	65	3-30-10	23,000.00	4,400
W½ SE¼	30	6	65	1-10-10	11,500.00	3,650
SW¼	13	6	67	2-11-10	15,000.00	3,826
NE¼	5	5	66	2-1-10	11,500.00	2,290
N½	31	6	67	4-28-09	11,600.00	1,060
N½ NW¼	30	5	67	2-25-10	5,500.00	1,140
S½ NW¼	30	5	67	2-25-10	5,000.00	1,400
NE¼	2	1	68	8-13-09	14,500.00	1,500
SE¼	25	4	68	5-16-10	15,000.00	2,460
NW¼	6	3	67	6-2-10	13,000.00	2,869
SW¼	20	3	66	2-21-10	4,500.00	580
N½ SW¼	20	2	66	12-3-09	6,000.00	734
				Total	$431,250.00	$85,653

172 1912 per cent of assessed valuation to sales value 19.86%
Total " " for year 1910 $79,950
1910 per cent of " " " " 18.53%

Endorsed: Affidavit of George G. Holcomb, Filed in the District Court on Sept. 4, 1913.

(Record Entry of Hearing, Sept. 4, 1913.)
Before Judge Lewis.

This cause comes on now to be further heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire,

appearing as solicitor for the plaintiff and Charles F. Tew, Esquire, appearing as solicitor for the defendants. And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

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173 (Record Entry of Hearing, Sept. 5, 1913.)
Before Judge Lewis.

This cause comes on now to be further heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire, appearing as solicitor for the plaintiff and Charles F. Tew, Esquire, appearing as solicitor for the defendants. And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

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174 (Affidavits for Defendants.)
Affidavit of Ray Robb.

State of Colorado,
County of Weld—ss.

Ray Robb, being first duly sworn according to law, deposes and says:

I was during the year 1912 the duly chosen qualified and acting Deputy Assessor of said county of Weld within and for one certain Deputy District in said county; I did the work of making assessments of the property within my said division in said county in said year for the taxes of said year.

In making said assessments I conformed to the very best of my ability to the instructions given me by A. R. Fisher, the County Assessor of said county to assess all of the taxable property in said county in my said district at a valuation of as much and not less than 33-1/3% of the actual cash value thereof and in pursuance of said directions I did make careful search and inquiry throughout my said division and district of said county by personal visit and inspection of the said
175 portion of said county in said year between the months of April and July and during the time of making the said assessments I did so far as possible interview and question all of the tax payers to me known or ascertained to be tax payers of said division of said county during said time and to the utmost of my ability and so far as possible, I did obtain from each and every of the tax payers in said county and said division a list and schedule of the taxable property of the said taxpayers in the manner directed by the said county assessor and as provided by law.

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The schedule obtained by me from the tax payers of said division of said county in the making of the said assessment were each and all upon uniform printed schedules, a copy of which form is hereto attached, hereby referred and by reference made a part hereof and for identity marked "Exhibit A."

I did in each instance of taxing property ask of each tax payer interviewed and from whom I obtained a schedule, each and all of the questions printed upon the said form of schedule attached, and in view of the said questions and answers and all thereof, and of my observation, study, inspection and understanding of the worth and cash value of the properties of said taxpayers and of all the property located in the said
176 division of said county I did value and assess the property so, by me assessed, and all thereof, at a value of not less than 33-1/3% of its then actual cash value.

In the matter of deducting the constitutional exemption of $200.00 allowed by law to heads of families residing in said division of said county, I did not deduct the said $200.00 from the assessed valuation of property of 33-1/3%; but I first determined the full cash value of the property of the person assessed and allowed the deduction of $200.00 in regard to personal property, thereby reducing the total value of the property of taxpayers so claiming exemption by the sum of $200.00 only, and thereafter I did fix the value of the taxpayer's property so allowed the said sum at not less than 33-1/3% of the value of the remainder of the property of such taxpayer.

In all cases of assessments of moneys and credits I made inquiry of each taxpayer assessed, whom I found, of the amount of money and credit held by him and allowed only the off-set in regard to such taxpayer as is by law permitted and allowed on account of debts and obligations of taxpayers assessed for moneys and credits.

I found many heads of families in my division of said county who own clocks and watches, or clocks or watches and other personal property who were possessed, however, of prop-
177 erty of a total value of not to exceed the value of $200.00, and in such instances I made no assessment of such property and took no schedule because no tax could be collected from or was payable by the said person who held only such exempt property.

In all cases where the property in my district was held by persons who were non-residents of Weld County, or could not be by me located during the time of making the said assess-

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IN BOOK

ments, I valued and assessed the property of such persons and taxpayers at a value of not less than 33-1/3% of the then cash value thereof.

I am now and during the year 1912 was familiar with the cash value of the assessable property located in my said division of said Weld County, Colorado, in 1912, and did assess the property and all thereof by me assessed in the manner aforesaid at a value of not less than 33-1/3% of the value thereof at said time, and the assessments made by me were fairly and honestly made with a purpose and intent to embrace all of the property of Weld County, and so as to cause to be assessed the said property locally assessed and such as is assessed by the State Tax Commission, at a uniform value, upon the same class of subjects, so as to cause the burdens of taxation to rest equally and uniformly upon all classes of taxable property, and upon all payers of taxes on property within the county of Weld.

178 RAY ROBB.

Subscribed in my presence and sworn to before me this 25 day of August, A. D. 1913.

My commission expires July 13, 1915.

(Notarial Seal) J. H. HUME,
Notary Public.

(Here follows tax list marked pages 107 and 108.)

See Revenue Law, 1902.

Tax Schedule

Pla
Pla
Occ

PRICE PER ACRE			ACRES			NO. OF LOTS OR DESCRIPTION
Agr'l	Graz	Min'l	Agr'l	Graz	Min'l	NOTE—List "Lands" by legal sub-divisions; by Number and Block; "Mining Claims" provements and machinery on same must be

NOTICE All Schedules should be filled out and returned to an authorized Deputy or to the Assessor at Weld County Court House, at once, but not later than May 20th, 1912. See Revenue Law, on back of Schedule. READ THE SCHEDULE CARFFULLY before subscribing to the oath.

A. R. FISCHER, Assessor.

.....
.....
.....

Of all property owned, controlled and held in WELD COUNTY, COLO., for the year 1912 By

No......

VALUATIONS					PERSONAL PROPERTY			
cultural Land	Grazing Land	Mineral Land Lots	Improvements	School Dist.	If no property is owned under any item the word "none" must be written opposite such item	VALUATION	School Dist.	CITY OR TOWN
					Aggregate cash value of all prom. notes bonds, stocks, debentures and other written evidence of indebtedness, $			
					Aggregate cash value of amount due upon book accounts and other accounts not evidenced by writing, $			
					Average cash deposits in Banking institutions, $			
					GROSS TOTAL, $			
					Deductions allowed by law, $			
					Net total money, notes and credits, $			
					Merchandise and Mfgrs., average value,			
					Value of furniture and fixtures,			
					Value of Household Goods and Furniture,			
					Value of Diamonds, Jewelry, Gold and Silver Plate,			
					NUMBER Value of Musical Instruments,			
					Value of Clocks and Watches,			
					Value of Bicycles or Motorcycles			
					Value of Automobiles,			
					Value of Agricultural Implements,			
					Value of all Road Vehicles,			
					Value of Swine,			
					Value of Sheep,			
					Value of Horses,			
					Value of Mules,			
					Value of Cattle,			
					Value of Bees,			
					Value of all other Animals,			
					Value of all other property o any kind not hereinbefore specifically enumerated.			
					Value of special privileges and franchises not assessed in connection with other property.			
					GROSS TOTAL,			
					Exemtion on personal property allowed by law to every person being the head of a family,	$200		
					NET TOTAL,			
					Are you the head of a family?			
					Military Poll,			

STATE OF COLORADO, } ss.
COUNTY OF WELD. }

I,.....
being duly sworn, say that to the best of my knowledge, information and belief, the foregoing schedule contains a true, full and complete list of all property held by or belonging to me on the first day of April of this year, including all moneys due me and the particular sums due me on that date, the average amount of money on hand, and the average value which I held in merchandise or manufactures during each calendar month of the year ending on the 31st day of March last past, whether on hand or owned by me, and all intangible property, whether having a value by itself or in connection with other property; that such property has been by me fully and fairly described to the assessor and its true condition and value represented. That I have in no case sought to mislead the assessor as to either quantity, quality or value of property, and that the deductions claimed from credits are BONA FIDE debts for a consideration received, and do not consist in any part in bonds, notes or obligations of any kind given to any insurance company on account of premiums on policies, or on account of any unpaid subscriptions to any literary, scientific, charitable or other like institution or society, or on account of any subscription due or indebtedness payable on capital stock in any company, whether incorporated or unincorporated, or on account of any obligation signed by me as surety for another; and I further swear that since the first day of April of last year I have not, directly or indirectly, converted or exchanged any of my property temporarily into bonds, treasury notes, or other securities of the United States, or into other non-taxable property or securities of any kind, save as in the said schedule set forth. I further swear that I have, to the best of my knowledge and belief, valued said property at its full cash value.

.....
Principal.

.....
Agent.

Subscribed and sworn to before me this.....

day of.....*A. D. 1912.*

A. R. FISCHER, ASSESSOR.

By:.....
Deputy.

179 Endorsed: Affidavit of Ray Robb, Filed in the District Court on Sept. 6, 1913.

Affidavit of Dan March.

State of Colorado,
County of Weld—ss.

Dan March, being first duly sworn according to law, deposes and says:

I was during the year 1912 the duly chosen qualified and acting Deputy Assessor of said county of Weld within and for one certain Deputy District in said county; I did the
180 work of making assessment of the property within my said division in said county in said year for the taxes of said year.

In making said assessments I conformed to the very best of my ability to the instructions given me by A. R. Fisher, the County Assessor of said county to assess all of the taxable property in said county in my said district at a valuation of as much and not less than 33-1/3% of the actual cash value thereof and in pursuance of said directions I did make careful search and inquiry throughout my said division and district of said county by personal visit and inspection of the said portion of said county in said year between the months of April and June and during the time of making the said assessments I did so far as possible interview and question all of the taxpayers to me known or ascertained to be taxpayers of said division of said county during said time and to the utmost of my ability and so far as possible, I did obtain from each and every of the taxpayers in said county and said division a list and schedule of the taxable property of the said taxpayers in the manner directed by the said county assessor and as provided by law.

The schedule obtained by me from the taxpayers of said division of said county in the making of the said assessment
181 were each and all upon uniform printed schedules, a copy of which form is hereto attached, hereby referred and by reference made a part hereof and for identity marked "Exhibit A".

I did in each instance of taxing property ask of each taxpayer interviewed and from whom I obtained a schedule, each and all of the questions printed upon the said form of schedule attached, and in view of the said questions and answers and all thereof, and of my observations, study, inspection and understanding of the worth and cash value of the properties of said

taxpayers and of all the property located in the said division of said county I did value and assess the property so, by me assessed, and all thereof, at a value of not less than 33-1/3% of its then actual cash value.

In the matter of deducting the constitutional exemption of $200.00 allowed by law to heads of families residing in said division of said county, I did not deduct the said $200.00 from the assessed valuation of property of 33-1/3%; but I first determined the full cash value of the property of the person assessed and allowed the deduction of $200.00 in regard to personal property, thereby reducing the total value of the property of taxpayers so claiming exemption by the sum of
182 $200.00 only, and thereafter I did fix the value of the taxpayers property so allowed the said sum at not less than 33-1/3% of the value of the remainder of the property of such taxpayer.

In all cases of assessments of moneys and credits I made inquiry of each taxpayer assessed, whom I found, of the amount of money and credit held by him and allowed only the off-set in regard to such taxpayer as is by law permitted and allowed on account of debts and obligations of taxpayers assessed for moneys and credits.

I found many heads of families in my division of said county who own clocks and watches, or clocks or watches and other personal property who were possessed, however, of property of a total value of not to exceed the value of $200.00, and in such instances I made no assessment of such property and took no schedule because no tax could be collected from or was payable by the said person who held only such exempt property.

In all cases where the property in my district was held by persons who were non-residents of Weld County, or could not be by me located during the time of making the said assessments, I valued and assessed the property of such persons and taxpayers at a value of not less than 33-1/3% of the then cash value thereof.

I am now and during the year 1912 was familiar with the
183 cash value of the assessable property located in my said division of said Weld County, Colorado, in 1912, and did assess the property and all thereof by me assessed in the manner aforesaid at a value of not less than 33-1/3% of the value thereof at said time, and the assessments made by me were fairly and honestly made with a purpose and intent to embrace all of the property of Weld County, and so as to cause to be assessed the said property locally assessed and such as is assessed by the State Tax Commission, at a uniform value, upon

See Revenue Law, 1902.

Tax Schedule

Pla
Pla
Occ

NOTICE All Schedules should be filled out and returned to an authorized Deputy or to the Assessor at Weld County Court House, at once, but not later than May 20th, 1912. See Revenue Law, on back of Schedule. READ THE SCHEDULE CAREFULLY before subscribing to the oath.

A. R. FISCHER, Assessor.

PRICE PER ACRE			ACRES			NO. OF LOTS OR DESCRIPTION
Agr'l	Graz	Min'l	Agr'l	Graz	Min'l	NOTE—List "Lands" by legal sub-divisions; by Number and Block; "Mining Claims" pr.vements and machinery on same must be

.....
.....
.....

Of all property owned, controlled and held in WELD COUNTY, COLO., for the year 1912 By

No......

VALUATIONS					PERSONAL PROPERTY			
Agricultural Land	Grasing Land	Mineral Land Lots	Improvements	School Dist.	If no property is owned under any item the word "none" must be written opposite such item	VALUATION	School Dist.	CITY OR TOWN
					Aggregate cash value of all prom. notes bonds, stocks, debentures and other written evidence of indebtedness, $			
					Aggregate cash value of amount due upon book accounts and other accounts not evidenced by writing, $			
					Average cash deposits in Banking institutions, $			
					GROSS TOTAL, $			
					Deductions allowed by law, $			
					Net total money, notes and credits, $			
					Merchandise and Mfgrs., average value,			
					Value of furniture and fixtures,			
					Value of Household Goods and Furniture,			
					Value of Diamonds, Jewelry, Gold and Silver Plate,			
					NUMBER Value of Musical Instruments,			
					Value of Clocks and Watches,			
					Value of Bicycles or Motorcycles			
					Value of Automobiles,			
					Value of Agricultural Implements,			
					Value of all Road Vehicles,			
					Value of Swine,			
					Value of Sheep,			
					Value of Horses,			
					Value of Mules,			
					Value of Cattle,			
					Value of Bees,			
					Value of all other Animals,			
					Value of all other property o any kind not hereinbefore specifically enumerated.			
					Value of special privileges and franchises not assessed in connection with other property.			
					GROSS TOTAL,			
					Exemtion on personal property allowed by law to every person being the head of a family,	$200		
					NET TOTAL,			
					Are you the head of a family?			
					Military Poll,			

STATE OF COLORADO, } ss.
COUNTY OF WELD. }

I,.....
being duly sworn, say that to the best of my knowledge, information and belief, the foregoing schedule contains a true, full and complete list of all property held by or belonging to me on the first day of April of this year, including all moneys due me and the particular sums due me on that date, the average amount of money on hand, and the average value which I held in merchandise or manufactures during each calendar month of the year ending on the 31st day of March last past, whether on hand or owned by me, and all intangible property, whether having a value by itself or in connection with other property; that such property has been by me fully and fairly described to the assessor and its true condition and value represented. That I have in no case sought to mislead the assessor as to either quantity, quality or value of property, and that the deductions claimed from credits are BONA FIDE debts for a consideration received, and do not consist in any part in bonds, notes or obligations of any kind given to any insurance company on account of premiums on policies, or on account of any unpaid subscriptions to any literary, scientific, charitable or other like institution or society, or on account of any subscription due or indebtedness payable on capital stock in any company, whether incorporated or unincorporated, or on account of any obligation signed by me as surety for another; and I further swear that since the first day of April of last year I have not, directly or indirectly, converted or exchanged any of my property temporarily into bonds, treasury notes, or other securities of the United States, or into other non-taxable property or securities of any kind, save as in the said schedule set forth. I further swear that I have, to the best of my knowledge and belief, valued said property at its full cash value.

.....
Principal.

.....
Agent.

Subscribed and sworn to before me this.....

day of.....*A. D. 1912.*

A. R. FISCHER, ASSESSOR.

By.....
Deputy.

111 & 112 the same class of subjects, so as to cause the burdens of taxation to rest equally and uniformly upon all classes of taxable property, and upon all payers of taxes on property within the county of Weld.

DAN MARCH.

Subscribed in my presence and sworn to before me this 26" day of August, A. D. 1913.

My commission expires Sept. 15", 1913.

[NOTARIAL SEAL.] CORNELIUS H. BOND,
Notary Public.

(Here follows tax schedule marked pages 113 and 114.)

questions printed upon the said form of schedule attached, and in view of the said questions and answers and all thereof, and of my observation, study, inspection and understanding of the worth and cash value of the property of said taxpayers and of all the property located in the said division of said county I did value and assess the property so, by me assessed, and all thereof, at a value of not less than 33⅓% of its then actual cash value.

In the matter of deducting the constitutional exemption of $200.00 allowed by law to heads of families residing in said division of said county, I did not deduct the said $200.00 from the assessed valuation of property of 33⅓%; but I first determined the full cash value of the property of the person assessed and allowed the deduction of $200.00 in regard to personal property, thereby reducing the
118 total value of the property of taxpayers so claiming exemption by the sum of $200.00 only, and thereafter I did fix the value of the taxpayer's property so allowed the said sum at not less than 33⅓% of the value of the remainder of the property of such taxpayer.

In all cases of assessments of moneys and credits I made inquiry of each taxpayer assessed, whom I found, of the amount of money and credit held by him and allowed only the off-set in regard to such taxpayer as is by law permitted and allowed on account of debts and obligations of taxpayers assessed for moneys and credits.

I found many heads of families in my division of said county who own clocks and watches, or clocks or watches and other personal property who were possessed, however, of property of a total value of not to exceed the value of $200.00 and in such instances I made no assessment of such property and took no schedule because no tax could be collected or was payable by the said person who held only such exempt property.

In all cases where the property in my district was held by persons who were non-residents of Weld County, or could not be by me located during the time of making the said assessments, I valued and assessed the property of such persons and taxpayers at a value of not less than 33⅓% of the then cash value thereof.

I am now and during the year 1912 was familiar with the cash value of the assessable property located in my said division of said Weld County, Colorado, in 1912, and did assess the property and all thereof by me assessed in the manner aforesaid at a value of not less than 33⅓% of the value thereof at said time, and the assessments made by me were fairly and honestly made with a purpose and intent to embrace all of the property of Weld County, and so as to cause to be assessed the said property locally assessed and such as is assessed by the State Tax Commission, at a uniform value, upon the same class of subjects, so as to cause the burdens of taxation to rest equally and uniformly upon all classes of taxable property, and upon all payers of taxes on property within the county of Weld.

A. L. HILTON.

Subscribed in my presence and sworn to before me this 25th day of August, A. D. 1913.

My commission expires Oct. 27, 1914.

[NOTARIAL SEAL.] ELMER C. ABBEY, JR.,
Notary Public.

(Here follows tax schedule marked pages 119 and 120.)

121 Endorsed: Affidavit of Al Hilton, Filed in the District Court on Sept. 6, 1913.

(*Record Entry of Hearing, Sept. 6, 1913.*)

Before Judge Lewis.

This cause comes on now to be further heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire, appearing as solicitor for the plaintiff and Charles F. Tew, Esquire, appearing as solicitor for the defendants. And thereupon comes the evidence the hearing of which is continued to the hour of adjournment.

Supplemental Affidavit of A. W. Scribner for Complainant.

STATE OF COLORADO,
City and County of Denver, ss:

A. W. Scribner, of lawful age, being first duly sworn, on oath says:

That he has examined the reference book of the Mercantile Agency of R. G. Dun & Company, issued in March, 1912, which book gives the ratings and financial standing of the merchants in Weld County, Colorado, based upon reports furnished by said merchants during the year ending with said month of March, 1912; that from said book it appears that the merchandise and credits of said merchants of Weld County, excluding lumber companies and other mercantile corporations operating in more than one county, and excluding also the merchandise assets of The Great Western Sugar Company, amounted to the total sum of $4,699,000.00; that the mercantile corporations operating in more than one county excluded from the foregoing computation, are The Clayton Lumber Company, The Empson Packing Company, the Gilchrest Lumber Company, The Knight-Campbell Music Co., The Forest Lumber Company and The Ambrose Lumber Company;

That the aggregate assessments of all of the property of said corporations in Weld County for the year 1912 amounted to a sum which is one third of $51,700.00, and for the purpose of this statement affiant uses said last-mentioned sum as the value of merchandise and credits in Weld County of said corporations; that in the year 1912 the assessment upon merchandise of the Great Western Sugar Company at each of its three plants in Weld County was $50,000.00,

122 and the assessment upon machinery, designated by the assessor as "Capital Employed in Manufacturers" was $35,000.00 for each of said plants, making a total assessment against The Great Western Sugar Company for "Average Amount of Money Invested in Merchandise" of $150,000.00, which multiplied by three amounts to $450,000.00; adding to the total shown by Dun's Merchandise Report the total indicated by the assessment of 1912 for the mercantile corporations doing business in more than

one county, and for the merchandise assessment of The Great Western Sugar Company, as aforesaid brings the total for merchandise and merchants' credits in Weld County, in 1912, to $5,200,700.00.

A. W. SCRIBNER.

Subscribed and sworn to before me this 16th day of September, A. D. 1913.

My commission expires Oct. 15/13.

[NOTARIAL SEAL.] JAMES T. NAFF,
Notary Public.

Endorsed: Filed in the District Court on Sept. 16, 1913.

PLAINTIFF'S EXHIBIT No. A.

Members of Commission: J. Frank Adams, Chairman; Sheldon E. Tucker, Secretary; Celsus P. Link, John B. Phillips.

STATE OF COLORADO,
Office of Colorado Tax Commission:

DENVER, COLORADO, August 27, 1913.

I hereby certify that the attached annual report of the Union Pacific Railroad Company for the year ending December 31, 1911, is a true and correct copy of the original, filed in the office of the State Board of Equalization under date of April 6, 1912, and is now on file in this office.

[Seal of Colorado Tax Commission.]

THE COLORADO TAX COMMISSION.
S. E. TUCKER, *Secretary.*

UNION PACIFIC SYSTEM

Statement of Capitalization, December 31st, 1911.

		Av. Mkt. Val. 1911	
U. P. R. R. Co. Common	$216,646,300	173	$374,798,099
U. P. R. R. Co. Preferred	99,569,300	91-7/8	91,479,294
O. W. R. & N. Co.	1,500		1,500
		Total Stocks	$466,278,893
		Bonds	329,232,380
Total stocks and bonds, market value			$795,511,273
Less deductions of property and securities which are not parts of the corporate plant but which are assets entering into and enhancing the value of the stocks and bonds of the system.			
Auxiliary stocks owned		$ 41,922,865	
Investment stocks, as per list,		255,281,144	
Bonds owned		36,283,540	
Land Assets		3,981,660	
Water Line Properties		4,000,000	
Cash and demand loans and time deposits		67,745,285	
Advances for construction of new lines and steam ships.....		27,694,499	436,908,993
Net capitalization, market value			$358,602,280
Miles main track,	7,084.52		
" second "	751.54		
Miles in Colorado			
" main track	583.20		
" second "	5.50		

Note:—As shown by the within report and by the annual report of the Union Pacific System for the year ending June 30th, 1911, which report is filed in connection herewith,
200 the Colorado mileage of the Union Pacific earns but half as much per mile as the average mileage of the system.

As shown further by these reports, the Union Pacific has about 746 miles of double track railroad in states outside of Colorado and only 5.50 miles of double track in Colorado.

In light of these facts, it is contended that the ascertaining of a taxable value of the Union Pacific mileage in Colorado by taking a mileage proportion of the value of its stocks and bonds, results in importing into Colorado taxable values belonging to other states and in assessing property permanently outside of the limits of the state and beyond its jurisdiction.

List of Investment Stocks Owned by Union Pacific System.

Name of Railroad		Par Value	Av. Mkt. Val. 1911	
Baltimore and Ohio,	Common	$ 32,334,200	101	1/8 $ 32,697,900
" " "	Preferred	7,206,400	88	6,341,632
Chicago and Alton,	"	10,343,100	45	4,654,395
C. & N. W.	Common	4,018,700	144¼	5,796,950
C. M. & St. P.	Preferred	1,845,000	148½	2,735,212
Illinois Central	Common	22,500,000	139½	31,387,500
New York Central	"	17,857,100	107¾	19,241,025
Northern Securities	"	724,900	No quot.	724,900
Railroad Securities	"	3,484,420	" "	3,484,420
Railroad Securities,	Preferred	1,936,400	" "	1,936,400
Southern Pacific,	Common	126,650,000	115½	146,280,750
Totals,		$228,900,220		$255,281,144

201 **Plaintiff's Exhibit No. a.**

Filed in office of State Board of Equalization April 6, 1912. Denver, Colorado, by H. C. Fairall, Secretary.

Annual Report
of the
Union Pacific Railroad Company
Made to
The State Board of Equalization of the State of Colorado.
For the Year Ending December 31, 1911.

These Schedules to be filed with the Secretary of The State Board of Equalization between the first day of March and the first day of April each year.

NAME OF OFFICERS	POSTOFFICE ADDRESS
President.....A. L. Mohler.....	.....Omaha.....
Vice-President....W. B. Scott.....	..... " .....
Secretary....Alexander Miller.....	.....New York .....
Treasurer....F. V. S. Crosby.....	..... " " .....
General Solicitor....N. H. Loomis.....	.....Omaha.....
General Manager..same as Vice-Pres-....	..... " .....
General Superintendent..Charles Ware..	..... " .....
Chief Engineer. ..R. L. Huntley.....	..... " .....
Auditor....H. J. Stirling.....	..... " .....
Tax Commissioner..A. W. Scribner.....	..... " .....
..A. F. Vickroy....	.....
Superintendents of Colorado Divisions }	.....
}	.....
.....	.....
.....	.....
.....	.....
.....	.....

NAME OF DIRECTORS

Oliver Ames	Charles A. Peabody	Otto H. Kahn
A. J. Earling	Marvin Hughitt	M. L. Schiff
H. W. DeForest	Robert S. Lovett	Joseph F. Smith
Julius Kruttschnitt	William Rockefeller	W. V. S. Thorne
Robert W. Goelet	William G. Rockefeller	Frank A. Vanderlip

SCHEDULE No. 1

Showing in detail for the year ending on the 31st day of December, 1911

FIRST—The whole number of miles of main track, side track and turnouts, operated or controlled by such corporation, as well that without as that within this State; the whole number of miles of such track within this State, which shall include the right-of-way and all grounds adjacent thereto, bridges, culverts, pipe lines, fences and snow sheds, owned, operated or controlled in this State by such railway company making the returns, the number of miles in each county, and the value thereof per mile; Provided, however, that any lines upon which trains are operated regularly shall be considered as a main track and assessed accordingly.

NAME OF LINE	Point of Beginning and Terminus	Counties	MILES OF TRACK					VALUE OF ROAD Taxable exel. right of way	
			MAIN TRACK				Side Track and Turnouts Owned or Operated		
			Owned	Operated	Total	Rolling Stock Over Other Lines and Track Rights		Per Mile	Total
Eastern District	Kans.-Colo State Ln								
	Denver	Cheyenne	63.13				9.24		
		Lincoln	42.75				9.93		
		Elbert	28.43				3.81		
		Arapahoe	25.97				3.51		
		Adams	27.19				3.53		
						Second Track	1.98		
		Denver	6.67				51.52		
						Second Track	1.98		
			194.14		194.14		81.54	$5840	$1133780
	Pullman					Second Track	1.80		

SCHEDULE No. 1

Showing in detail for the year ending on the 31st day of December, 1911

FIRST—The whole number of miles of main track, side track and turnouts, operated or controlled by such corporation, as well that without as that within this State; the whole number of miles of such track within this State, which shall include the right-of-way and all grounds adjacent thereto, bridges, culverts, pipe lines, fences and snow sheds, owned, operated or controlled in this State by such railway company making the returns, the number of miles in each county, and the value thereof per mile; Provided, however, that any lines upon which trains are operated regularly shall be considered as a main track and assessed accordingly.

NAME OF LINE	Point of Beginning and Terminus	Counties	MILES OF TRACK					VALUE OF ROAD Taxable excl. right of way	
			MAIN TRACK				Side Track and Turnouts Owned or Operated		
			Owned	Operated	Total	Rolling Stock Over Other Lines and Track Rights		Per Mile	Total
Northern District	Colo.-Wyo. State Li	ne Denver	1.80				13.78		
					Se	cond Track	1.03		
		Adams	15.97				5.72		
		Weld	73.71				31.61		
					Se	cond Track	2.83		
			91.48		91.48		51.11	$7117	$651100
Boulder Branch	Brighton Boulder (Incl. Baum, McKissick and Puritan spurs)	Adams	1.68						
		Weld	13.69				13.00		
		Boulder	11.16				2.09		
	Julesburg		26.53		26.53		15.09	4138	109770

SCHEDULE No. 1—Continued.

Julesburg Branch	La Salle	Weld	31.24				5.94		
		Morgan	41.74				6.83		
		Washington	2.78				.31		
		Logan	53.44				17.03		
		Sedgwick	22.33				4.17		
			151.53		151.53		34.28	5951	901975
	Nebr.-Colo.State Ln				Se	cond Track	.69		
Nebraska Division	" " " "	Sedgwick	8.86		8.86		6.49	8620	76380
	Sand Creek Junction								
Denver North'n Branch	La Salle Junction	Adams	14.50				2.48		
		Weld	30.76				6.29		
			45.26		45.26		8.77	5388	243840
203									
	Greeley Junct.								
Greeley Branch	Briggsdale	Weld	26.16		26.16		5.73	4438	116100
	Cloverly								
Pleasant Valley Branch	Hungerford	Weld	14.15		14.15		2.52	4356	61640
	Dent								
Ft. Collins Branch	Ft. Collins	Weld	8.52				1.76		
		Larimer	16.57				9.10		
			25.09		25.09		10.86	5264	132080
		Total,							

SCHEDULE No. 1—Continued.

	Total Mileage Statement		MILES OF MAIN TRACK				Sidetrack and Turnouts	Taxable Value of Road Per Mile	Total
			Owned	Operated	Total	Rolling Stock Over Other Lines and Track Rights			
Within State of Colorado,	Lines operated		583.20		583.20		221.89	$5876	$3426065
Outside State of Colorado,	Lines operated								
	Union Pacific Syste	m	6501.30						
	Lines Operated	Grand total,	7084.52						

SCHEDULE No. 1—Concluded

Statement showing mileage of all companies comprising total mileage within and without State of Colorado, and point of beginning and terminus thereof.

203a NAME OF LINE	Point of Beginning and Terminus		MAIN TRACK					Value of Road Tax'bl exc. right of way	
			Owned	Operated	Total			Per Mile	Total
Union Pacific Railroad proper			3537.29						
Oregon Short Line R. R. and Branches			1663.88						
Oregon R. R. & Nav. and Branches			1883.35						
		Total	7084.52						
		Total							

SCHEDULE No. 2

Showing number of miles of track; number of bridges, culverts and turn tables; number of miles of telegraph and telephone used exclusively for railroad business, within State of Colorado.

Name of Line	Point of Beginning and Terminus	Number of Miles of Track Within the State			Number of Bridges	Number of Culverts	Number of Turn Tables	Number of Miles of Telegraph				Number of Miles of Telephone			
		Owned	Leased	Operated				No. Instruments	Miles Poles	Miles Wire	Value	No. Instruments	Miles Poles	Miles Wire	Value
Union Pacific Railroad in Colorado		583.20							N	one			No	ne	

SCHEDULE No. 3

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
204	EASTERN DISTRICT						
Cheyenne County, Arapahoe	Stock Chute			$ 15	on right of Way		
	Section House	25x37		116			
	Jap house	14x34		63			
	Coal house	8½x10½		8			
	Tool house	12x12		5			
	" " (temp.depot)	14x16		30			

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Cheyenne Wells	Depot	24x60		815			
	2 tool houses	12x12		9			
	Dispatcher's house	16x48		120			
	Coal house	7x11		7			
	Ice house	31x64		135			
	Asst. Supt. house	16x28		337			
	Stable	13x16		4			
	Coal house	7x13		8			
	Section house	24x32		350			
	Coal house	8x12		18			
	Section house	24x37		125			
	Coal house	5x12		8			
	Jap house	14x34		100			
	Stockyards & scales	3 pens		95			
	Coal chute	30½x96		500			
	Privy	4½x14½		5			
	Coal bin	9½x16½		3			
	Maintainer's house	24x32		500			
	Signal repair house	18x24		365			
	C. H. & P.	8x12		25			
	Well			200			
	Steel tank & standpipe			1200			
	Toolhouse (temp. dpt.)			46			
First View	Depot	12x62		85			
	Coal house	8x16		20			
	Section house	32x32		150			
	Coal house	8x12		10			
	Bunk house	16x24		15			
	Tool house	12x13		7			
	Stock chutes			15			

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SCHEDULE No. 3—Continued.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
Arena	Section house	24x32		$ 243			
	Bunk house	12x18		37			
	Tool house	12x12		15			
Kit Carson	Depot, plat. & furn	24x64		543			
	Coal house	8x16		20			
	Tank & pump house	19x24		1,405			
	Bunk house	14x34		90			
	Section house	24x32		205			
	Coal house	8x12		19			
	" "	7x11		9			
	2 bunk houses	16x17		7			
	Tool house	13x13		12			
	Stock yards & scales	4 pens		150			
	Water softener	13½x45		2,000			
	Lime house	16x24		50			
	Well			205			
Sorrento	Stockyards	64x128		120			
	Temp. depot (car body)			15			
Wild Horse	Section house	36x39		117			
	Storehouse	13x14		8			
	Coal house	9x13		7			
	Platform	8x28		5			

	2 tool houses	13x13		14			
	Section house	24x32		314			
	Coal house	8x12		20			
	Coal plat. & incline	8x20		27			
			Carried forward	$11330			

SCHEDULE No. 3—Continued

			Brought forward	$11330			
204A							
Cheyenne Co. Continued							
Aroya	Depot, plat.& furn.	24x64		425			
	Tool house	10x14		25			
	Coal house	8x16		16			
	Sand house	11x13		5			
	Section house	28x31		125			
	Bunk house	16x25		13			
	Stock yards & scales	143x120		83			
	Tank	24x16		465			
	Windmill			167			
	Pump house	14x14½		156			
Lincoln County, Boyero	Section house	19x42		100			
	2 bunk houses	16x30		10			
	Coal house	8x12		7			
	Car house	13x13		7			
	Section house	24x32		335			
	Depot, plat. & furn.	12x16		32			
	Coal house	8x12		22			
	Stock yards	64x128		93			
Mirage	Water Softener	13½x145		2000			
	Lime house	16x24		55			
	Tank house	16x24		510			

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Pump house	14½x14½		$ 205			
	Sand house	12x12		5			
	Standpipe&connection	10		140			
	Coal bin	11x42		18			
	Section house	32x32		150			
	Coal house	9x11		7			
	Tool "			7			
	2 bunk houses	14x16		15			
	Car house	13x13		10			
	Bunk house	14x34		75			
Hugo	Depot, plat & furn.	49x123		333			
	Coal house	9x12		10			
	Tenement house	14x44		100			
	Jap house	14x34		90			
	Coal house	5x21		12			
	Section house	24x40		150			
	Barn	14x50		22			
	Coal shed			8			
	Coal house	8x16		19			
	Stock yards & scales	3 pens		120			
	2 car-houses	12x13		13			

	Engine house	8 stalls	6000	
	Boiler house	30x46	700	
	Turntable	80'	1530	
	Double cinder pit		1125	
	Coaling station		3125	
	Tank & pipe line		800	
	Standpipe & pipe line		900	
	Steam pump in boiler house		110	
	15' dug well		375	
	Sewer system		265	
	2 store rooms	30x50	800	
	Oil house	14x24	122	
	Sand house		600	
	Ice house	32x64	1000	
	Track scales	50'-100T	700	
	R. M. Office		175	
Bagdad	Stock yards	2 pens	113	
Lake	Depot, plat. & furn.	12x16	16	
	Tank	16x24	150	
	Pump house	16½x16½	35	
	Section house	16x36	67	
	Coal house	9x12	8	
	Tool house	12x12	5	
	Bunk house	14x30	5	
	" " (temp.)		8	
	Well	16' diam.	40	
		Carried forward	$36263	

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
205		Brought	forward	$ 36 263			
Lincoln County—Continued							
Limon	Section house	24x32		237			
	Fence at section hs.			21			
	Bunk house	12x18		46			
	Car house	13x13		13			
	Stock yards & Scales	4 pens		161			
	Wool platform	8x50		18			
	Privy	4x5		16			
	Bunk house	12x20		40			
Elbert County, River Bend							
	Depot, plat. & furn.	20x52		120			
	Coal house	8x15		8			
	Section house	24x32		300			
	2 bunk houses	16x24		50			
	Coal house	8x16		33			
	Bunk house	15x41		15			
	Tool house	13x13		7			
	Stock yards & scales	3 pens		105			
	Windmill, tank & well			57			
Godfrey	Section house	25x39		145			
	Bunk house	13x27		12			

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	Tool house	13x13		6			
Agate	Depot, plat. & furn.	24x64		620			
	Coal house	8x16		35			
	Tank & well	19x24		1114			
	Windmill			110			
	Section house	16x25		112			
	2 bunk houses			18			
	Pumper's house	24x26		85			
	Tool house	12x13		5			
	Stock yards & scales	4 pens		85			
Lowland	Tool nouse (temp. depot)	12x16		50			
Arapahoe County, Deer Trail	Depot, plat. & furn.	20x48		136			
	C. H. & P.			25			
	Coal house & plat.			12			
	Tank, pump hs. & well			490			
	Wool platform	16x69		13			
	Section house	14x47		103			
	Bunk house	14x40		28			
	2 tool houses	12x12		10			
	Stock yards & scales	5 pens		122			
	Standpipe			190			
	Water softener			1871			
	Lime house	16x24		52			
	Wool plat. (temp.)	20x30		45			
Peoria	Depot, plat. & furn.	12x16		34			
Byers	Depot, plat. & furn.	20x64		200			

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SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Coal house	7x11		$ 8			
	Tank			1067			
	Windmill & pumps hs.	14x14		218			
	Wool platform	16x60		12			
	Section house	30x40		170			
	2 bunk houses	14x28		56			
	Stock yards	2 pens		33			
	2 tool houses	10x14		27			
	Water tank & well			1200			
Strasburg	Tool hs. (temp. depot)	12x16		42			
Adams County, Bennett	Depot, plat. & furn.	20x64		167			
	Coal house	8x12		10			
	Section house	15x43		103			
	2 bunk houses	14x28		31			
	C. H. & P.	8x12		30			
	2 tool houses	12x16		16			
	Stock yards	2 pens		113			
			Carried forward	$ 46 591			

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	Brought	forward		$ 46 591		
Adams County, Continued						
Watkins	Bunk house	14x40		17		
	Depot, plat. & furn.	20x48		117		
	Coal house	8x16		23		
	Tank	16x24		375		
	Tool house	12x12		8		
	Stock yards	2 pens		33		
	Section house	35x36		167		
	Windmill & pumphouse			175		
	Well	14' diam.		275		
Denver County, Sable	Depot plat. & furn.	10x20		45		
	Section house	16x42		100		
	Coal house	8x16		15		
	Bunk house	14x40		13		
	Tool house	10x14		5		
	Stock yards	3 pens		142		
Sandown	Platform	14x68		12		
	Stock yards	2 pens		73		
	Coal & oil house	8x14		24		
	Powder house	15x20		33		
Steel Spur	Freight platform	14x69		10		
		Total Eastern	District	$ 48 253		

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	NORTHERN DISTRICT						
Denver County, Denver	Fr'ght depot, platf. shed, etc	62x396		$ 3000			
	Check house	7x13		3			
	3 Ice houses			4250			
	Tank	16x24		150			
	Check house	8x8		5			
	2 tool houses	8x10		10			
	Car inspector's office	9x23		16			
	Y. M. Office	9x11		13			
	Oil house	12x15		17			
	Repair Insp'r's office	16x16		33			
	Sand house	16x32		55			
	Lamp house	10x14		18			
	Tool house	10x14		18			
	Bunk house	12x18		25			
	Round house	28 stalls		4 875			
	Turntable	56'		275			
	Coach cleaners bld'g	16x50		245			
	Storage shed	8x10		8			
	Blacksmith shop	10x16		13			
	Oil house	25x23		187			
	Inspector's office	8x17		17			
	Lantern oil house	12x20		17			

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	Switchman's house	14x18		18				
	Pump house	10x10		13				
	Y. M. office	18x24		45				
	Track scales	100T		1171				
	Stable and shed	10x14		12				
	2 watchtowers & Crs'g gates			100				
	2 Watchman's shanties	8x8		12				
	Switchmen's "	6x6		3				
	Watchman's "	9x11		25				
	Stockyards "	1 pen		50				
	Pipeline & well			800				
	Transfer cl'k's office	8x14		12				
	Linenhouse & add'n (2)	14x24		254				
	Air hoist & crane	4 ton		122				
	Drop pit			30				
	Well			120				
		Carried	forward	$ 16 032				
206	Brought	forward		$ 16 032				
Denver County, Continued								
Pullman	Depot plat. & furn.	14x40		100				
	Maintainer's house	24x32		420				
	2 tool houses	12x16		85				
	C. H. & P.	8x12		30				
	Switchman's shanty	7x11		8				
	Tank	16x24		150				
	Coal chute	30x206		1 335				
	Coal platform	17x500		50				
	Round house	78'		13 550				
	Turntable	72'		1 175				
	Sand house	22x30		67				

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Oil house	26x38		$ 150			
	Watchman's shanty	6x6		5			
	Section house	30x46					
	Car house	12x12		177			
	Bunk house	14x34		67			
	Tool house	10x14		5			
	Track scales	100T		728			
	Gaso storage tank			472			
	Coal bin	16x32		34			
	Privy	12x18		50			
	Office Bl'dg	46x60					
	Store house	46x164		3 675			
	Hose house for shop	8x12		22			
	Well	4½"		312			
	Steel racks (2)			58			
	Scrap bin	18x59		25			
	Coal bin	19x109		67			
	Blacksmith shop	80x200		2 780			
	Paint shop	48x242		3 570			
	Coach shop	96x272					
	Boiler & Eng. House used for store room	40x42		9 503			
	Car erecting shop	125x226					

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	Boiler room	42x44				
	Engine room	25x61				
	Lavatory	19x24			13 353	
	Transfer table & pit	72x410				
	Motor house	5x12			1 014	
	Wash room	18x37			367	
	Dry kiln	22x60			726	
	Lumber house	14x30			50	
	Lumber shed	20x200			320	
	Bath house	20x42	& 11x15		503	
	2 hosecart houses				30	
	Mat'l platform	32x85			7	
	2 ash pits	10x46	& 10x26		358	
	Standpipe and con's	12'			205	
Adams County, Sand Creek Jc.	Tool house (temp. tel offs)	12x18			50	
Haseltine	Depot plat. and furn.	16x24			75	
	Section house	24x35			112	
	Coal & toolhouse	12x12			12	
	Bunk house (temp.)	14x18			40	
Henderson	Stockyards	1 pen			60	
Brighton	Depot plat. & furn.	24x64	16x24		710	
	Pumph's standpipe & c'l bin				85	
	Section house	37x35			167	
	2 bunk houses	14x18			27	
	2 tool houses	13x13			13	
	Maintainer's house	24x32			500	
	C. H. & P.	8x12			30	

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Tool house	12x16		$ 40			
	Stockyards	2 pens		73			
	Water softener			1 964			
	Lime house	16x24		52			
	Tank	16x24		452			
206a	Brought	Carried forward		$76 107			
				$76 107			
Weld County. Lupton	Depot—plat. & furn.	20x46		222			
	Jap house	14x34		97			
	3 coal bins	8x16		49			
	Section house	26x40		150			
	Tool house	13x13		10			
	Stock yards	2 pens		136			
	Loading platform			48			
Platteville	Depot—plat. & furn.	24½x60		500			
	Coal house	8x16		17			
	Pump house	17x17		62			
	Coal house	7x16		8			
	Coal shed	16x20		13			
	Tool house	12x12		5			

	Stockyards	5 pens		163		
	Jap house	14x34		97		
	Coal house	8x12		21		
	Section house	24x32		500		
	C. H. & P.	8x12		30		
	Maintainer's house	24x32		500		
	Tool house	12x16		40		
	C. H. & P.	8x12		30		
	12" Std pipe and p' line tnk & well			1 100		
Gilcrest	Depot—plat & furn.	24x64		704		
	C. H. & P.	8x16		46		
	Section house	26x29		120		
	Bunk house	12x18		43		
	Stockyards	2 pens		73		
	Tool house	12x12		5		
Peckham	Freight platform	11x40		11		
LaSalle	Depot—plat. & furn.	24x76	24x95	1 400		
	Stand pipe			83		
	Pump house	14x14		250		
	Agent's house	21x43		120		
	Section house	25x46		153		
	Tool house	10x14		13		
	Stockyards	3 pens		78		
	Water softener			2 300		
	Lime house	16x24		52		
	Jap house	14x34		85		
	Coal house	8x12		22		
	Maintainer's house	24x42		500		

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Privy	4x6		$ 15			
	Charging station	18x24		365			
	Tool house	12x16		40			
	C. H. & P.	8x12		27			
	Well	6"x250'		83			
	C. H. & P.	8x16		22			
	C. H. & P.	12x14		64			
	Water tank	19x24		1 085			
	2 Standpipes & con's	12"		1 100			
	Coaling station	2-40 T pckts. & 1-300 T pckt.		9 200			
	Engine house	4 stalls		4 450			
	Turntable	80'		2 700			
Evans	Depot—plat. & furn.	20x00		738			
	Coal house	8x16		19			
	Section house	32x34		153			
	Jap & tool house	14x34		90			
	Stock chute	6x16		5			
Greeley	Depot—plat. & furn.	29x99		1 700			
	Freight house	28x80		1 800			
	Tool house	8x8		17			

		Track scales	7½x60		100			
		Weight room	6x12		10			
		2 watchman's houses	6x6		7			
		Tool house	12x12		8			
		Stockyards & scales	4 pens		156			
		Motor car house and store house	20x70 & 8x14		333			
		3 Watchman's shanties			95			
				Carried forward	$110 339			
207		Brought forward			$110 339			
	Weld County Lucerne (continued)	Depot—plat. & furn.	24x64		640			
		C. H. & P.	8x16		22			
		Stockyards and scales	6 pens		231			
	Eaton	Depot—plat. & furn.	20x60		333			
		Coal house	8x16		17			
		Section house	16x28		123			
		St'd pipe & con's	12"		350			
		Maintainer's house	22x29		500			
		Tool house	12x12		10			
		Jap house	14x34		111			
		Stock yards	4 pens		147			
		Tank and windmill			74			
		Scales			49			
	Ault	Stockyards & scales	2 pens		112			
		Depot—plat. & furn.	24x80		598			
		Coal house	8x16		27			

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
Pierce	Tank	16x24		$ 150			
	Depot—plat. & furn.	24x64		610			
	Coal house	8x16		29			
	Pump house	16x25		214			
	Section house	25x64		137			
	Bunk house	16x24		25			
	2 tool houses	12x12		10			
	Windmill			167			
	Stockyards	2 pens		94			
	C. H. & P.	8x16		40			
	Tool house	12x16		44			
	Maintainer's house	22x29		400			
	Well	15' diam.		412			
	Bunk house (temp.)	14x18		8			
Dover	Section house	28x28		133			
	Bunk house	12x18		49			
	Tool house	10x14		5			
Nunn	Depot—plat. & furn.	24x64		960			
	C. H. & P.	8x16		35			
	Stockyards	2 pens		240			
	Depot—plat. & furn.	16x73		133			

	Tank & pump house	19x24		1 220		
	Coal platform	10x51		10		
	Coal chute	10 pckts		714		
	Ad'dn to coal chute	10 5 T pckts		572		
	Section house	24x34		120		
	Bunk house & 2 tool h'ses	16x24		46		
	Coal house & stockyards	1 pen		44		
	Standpipe, con., etc.			750		
	Coal chute & ad'dn	30'		63		
	Bunk house (temp.)	14x18		27		
	Maintainer's house	22x29		400		
	Tool house	12x16		44		
	C. H. & P.	8x12		30		
Frederick	Depot—plat. & furn.	22x40		570		
Gowanda	Water tank	19x24		960		
	Stand pipe	12"		354		
	Total Northern		District	$123 502		
			NEBRASKA DIVISION			
Sedgwick County—Julesburg	Engine house & turntable	79x137		1 232		
	Bunk house (temp.)	14x18		40		
	Sand house & bin	10x30		22		
	Section house	27x54		258		
	Tool house	10x14		5		
	Stockyards	3 pens		50		
	Coaling station	28–5 T pckts.		388		
	2 watch houses	6x11		8		

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Depot—plat. & furn.	24x74 & 24x32		$ 420			
	2 coal houses			35			
	Tank	16x24		150			
	Water softener			1 953			
	Lime house	16x24		47			
		Carried	forward,	$ 4 608			
207A		Brought forward		$4 608			
Sedgwick County	Pump house & ad'dn	12x28 12x12		270			
Julesburg, (continued)	]Repaid] house	9x11		7			
	Agent's house	20x30		103			
	3 st'd pipes & con.	12"		1 100			
	Tool house	10x14		13			
	Maintainer's houses (2)	24x32		920			
	2 coal houses & privy	8x12		60			
	Tool house	12x16		40			
	Section house	24x32		364			
	Jap house	14x34		115			
	C. H. & P.	8x12		30			
	Ash & cinder pit			21			
	Turntable	66'		791			
Weir	Section house	24x34		117			

THIS PAGE BO

	Coal house	8x10		5
	Jap house	14x34		89
	Coal house	8x12		21
	Tool house	10x14		12
	Telephone booth	6x6		16
		Total Nebraska	Division	$ 8 702
		JULESBURG BRANCH		
Sedgwick County, Ovid	Tool house (temp. depot)	12x16		48
Sedgwick	Depot—plat. & furn.	24x60		170
	Coal house	7x13		7
	" "	8x16		19
	Tank, Standpipe & Pipelines			1 425
	Windmill & tower			48
	Section house	24x25		212
	2 tool houses	10x11		9
	Stock yards	2 pens		63
	Maintainer's house	24x32		125
	Bunk house	14x18		27
	Tool house	12x16		40
	C. H. & P.	8x12		30
Red Lion	Stockyards	1 pen		74
Logan County, Crook	Depot—plat. & furn.	24x60		167
	Bunk house (temp.)	12x18		26
	Coal house	8x16		10
	2 privies	4x6		7
	Coal house	7x13		7

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Tank	16x24		$ 312			
	Windmill, tower & pump house			205			
	Section house	24x46		125			
	Stockyards & scales	3 pens		67			
	2 tool houses	10x14		21			
	Jap houses	14x34		99			
	Well	15'		150			
Proctor	Stockyards	1 pen		104			
	Tool house	12x16		28			
Iliff	Depot—plat. & furn.	24x60		167			
	Coal house	8x16		10			
	Windmill & tower			42			
	Section house	24x43		125			
	Coal house	7x13		10			
	2 tool houses	10x14		11			
	Stockyards	4 pens		67			
	Jap house	14x34		83			
	Tank	19x24		1 000			
	Standpipe	12'		245			
	Stock scales	6 ton		56			
	Maintainer's house	24x32		420			

		Tool house	12x16		40			
		C. H. & P.	8x12		7			
		Wells			300			
11—431	Sterling	Depot—plat. & furn.	24x108		2 013			
		Freight depot	24x121		417			
		Hotel	60x66		417			
		Sample Room	17x23		30			
		Ice house	12x16		17			
			Carried	forward,	$ 9 171			
	208		Brought	forward	$ 9 171			
155	Logan County, Sterling (continued)	Coal house	12x22		17			
		Laundry	17x24		33			
		Refrigerator	6x6		7			
		Tank	19x24		837			
		Windmill & wheel			119			
		Oil house	7x9		8			
		Agent's house	20x44		108			
		Coal house	6x12		5			
		Section house	24x44		127			
		2 tool houses	10x14		21			
		Coal house	10x13		7			
		Stockyards	4 pens		83			
		Stock scales	6 tons		47			
		Standpipe & cons.			257			
		2 temp. bunk houses			38			
		Engine house	10 stalls		8 140			
		Turntable	80		2 100			
		Ice house	24x50		920			
		Coaling station & sand house			7 600			

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Cinder pit			$1250			
	Maintainer's house	24x32		375			
	Charging station	18x24		415			
	Tool house	12x16		30			
	Storeroom & F'man's offs.	20x37		67			
	Well	6"		450			
Atwood	Stockyards	2 pens		63			
	Coal shed	14x14		15			
	Unl'dg beet platform	10x353		13			
Merino	Depot—plat. & furn.	24x60		167			
	Coal house	8x16		18			
	" "	7x13		10			
	Tank			807			
	Windmill & tower			48			
	Pump house	12x14		160			
	Section house	24x44		153			
	2 tool houses	10x14		24			
	Stockyards	3 pens		58			
	Stock scales	6 tons		17			
	Stand pipe & line	12"		333			
	Maintainer's house	24x32		375			

	Tool house	12x16		40			
	C. H. & P.	8x12		27			
	Bunk house (temp)	14x20		32			
Messex	Tool house (temp. depot)	12x16		47			
Balzac	Stockyards	1 pen		25			
Morgan County, Union	Depot—plat. & furn.	24x48		399			
	Coal house	8x16		23			
	Maintainer's house	24x32		500			
	C. H. & P.	8x12		30			
	Tool house	12x16		40			
	Maintainer's house	24x44		450			
Cooper	Stockyards	2 pens		63			
Snyder	Depot—plat. & furn.	24x60		167			
	Coal house	8x16		25			
	Tank	19x24		1 000			
	Pump house	14x14		52			
	2 tool houses	10x14		24			
	Stockyards & scales	4 pens		63			
	Windmill & tower			48			
	Standpipe	12"		275			
	Bunkhouse (temp.)			27			
Ft. Morgan	Depot—plat. & furn.	24x60		167			
	Coal house	8x16		26			
	" "	7x13		7			
	Tank	16x24		375			

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Windmill & tower			$ 135			
	Section house	24x45		153			
	2 tool houses	10x14		24			
	Stockyards & scales	3 pens		90			
	Maintainer's house	24x32		500			
	Tool house	12x16		40			
	C. H. & P	8x12		30			
		Carried	forward	$39 397			
208A		Brought	forward,	$39 397			
Morgan County, (Cont.)							
Ft. Morgan	Coal chute	2 pockets		150			
	Temp. bunk house	12x18		32			
	Coal platform	18x45		5			
	Pump house & mach.	14x14		442			
Welden	Depot—plat. & furn.	22x50		133			
	2 coal houses	8x16 7x13		32			
	Section house	24x32		216			
	Tool house	10x14		12			
	Stockyards	1 pen		37			
	Jap house	14x34		96			
Goodrich	Stockyards	2 pens		505			

	Orchard	Depot—plat. & furn.	24x60		167			
		Coal house	8x16		23			
		" "	7x13		10			
		Section house	24x32		249			
		Tank			1 100			
		Standpipe	12"		200			
		Pump house	12x14		160			
		Windmill & tower			48			
		Stockyards	4 pens		125			
		Stock scales	6 tons		43			
		Tool house	10x14		12			
		Bunk house (temp.)	14x18		32			
		Maintainer's house	24x32		125			
		C. H. & P.	8x12		30			
		Tool house & fence	12x16		30			
	Masters	Section house	24x32		150			
		Coal house	8x16		23			
		Tool house	10x14		8			
		Stockyards	2 pens		62			
		Stock scales	6 tons		87			
		Jap house	14x34		104			
	Hardin	Section house	25x44		150			
		Depot—plat. & furn.	24x60		170			
		Coal house	8x16		23			
		Tank	19x24		1 000			
		Windmill & tower			48			
		Tool house	10x14		12			
		Coal house	7x13		10			
		Stockyards	4 pens		67			

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Stock scales	10 tons		$ 22			
	Bunk house (temp.)	12x18		32			
	Maintainer's house	24x32		420			
	Tool house	12x16		35			
	C. H. & P.	8x12		25			
	Pump house	14x14		364			
Kuner	Temp. depot (tool house)	12x16		40			
Kersey	Depot—plat. & furn.	20x46		133			
	Coal house	8x16		23			
	Section house	24x32		235			
	Bunk house	14x34		68			
	Tool house	10x14		5			
	Stockyards	2 pens		86			
		Total Julesburg Branch		$46 813			
209		BOULDER BRANCH					
Weld County, Erie	Depot—plat. & furn.	19x33		$ 100			
	Section house	25x38		400			
	Bunk house	10x23		13			
	2 tool houses	12x12		11			
	Coal platform	12x30		10			

	Water tank	16x24		150
	C. H. & P.	3x12		28
Tabor	Stockyards	2 pens		33
	Temp. depot	12x16		37
Liggett	Stockyards	1 pen		85
Boulder Jct.	Office	5x6		3
	Section house	38x33		170
	Tool house	12x12		5
	Bunk house			13
	C. H. & P.	6x12		6
Boulder	Motor car house	20x70		
	Gasoline "	8x12		
	Oil platf. & privy			245
Parkdale	Registering station	4x5		13
	TOTAL BOULDER BRANCH			$ 1 323
	DENVER NORTHERN BRANCH			
Adams County Quimby	Section house	24x32		464
	C. H. & P.	8x12		27
	Tool house	12x16		45
East Lake	Depot—plat. & furn.	24x64		800
	C. H. & P.	8x16		40
	Stockyards	3 pens		202
	Stock scales	6 tons		72
	Windmill & tank	12' W. 30' T.		112
Darlow	Well	720' deep		530

SCHEDULE No. 3, Cont.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	Water tank	10x24		$ 900			
	Standpipe	12"		355			
St. Vrains	Depot--plat. & furn.	24x64		800			
	C. H. & P.	8x16		40			
	Section house	24x32		464			
	C. H. & P.	8x12		37			
	Tool house	12x16		45			
Dacono	Depot—palt. & furn.	24x40		187			
	C. H. & P.	8x16		35			
Gowanda	Depot—plat. & furn.	24x64		834			
	C. H. & P.	8x16		42			
	Stockyards	2 pens		167			
	Stock scales	6 tons		75			
	Total Denver Northern		Branch.	$ 6 333			
		GREELEY	BRANCH				
Weld County Cloverly	Depot—plat. & furn.	24x64		800			
	C. H. & P.	8x16		40			
Gill	Depot—plat. & furn.	24x64		800			

		C. H. & P.	8x16		40			
		Section house	24x32		464			
		C. H. & P.	8x12		27			
		Tool house	12x16		45			
		Stockyards	4 pens		256			
		Stock scales	6 tons		72			
	Cornish	Depot—plat. & furn.	24x64		800			
		C. H. & P.	8x16		40			
		Section house	24x32		464			
		C. H. & P.	8x12		27			
		Tank	19x24		1 083			
		Well	15''		122			
				Carried forward,	$ 5 080			
163	209A			Brought forward,	$ 5 080			
	Weld County, Cornish (Continued)	Stockyards	2 pens		160			
		Stock scales	6 tons		72			
		Pump house			333			
		Standpipe	12''		367			
	Fosston	Temp. depot (tool house)	12x16		63			
	Briggsdale	Depot—plat. & furn.	24x64		833			
		C. H. & P.	8x16		42			
		Stockyards	4 pens		267			
		Stock scales			75			
				Total Greeley Branch	$ 7 292			

SCHEDULE No. 3—Continued.

Showing size, character, value and location of depots, station houses, eating houses, machine shops and other buildings owned or controlled and used, or necessary to be used, for the convenient and proper operation of the road, the lands occupied by same and the value thereof, within the State of Colorado.

LOCATION	CHARACTER	Size	Material	Value	Description of Land Occupied	Value of Land Occupied	TOTAL VALUATION
	PLEASANT VALLEY BRANCH						
Weld County, Hungerford	Temp. depot (tool hs.)	12x16		$ 40			
	Water tank	19x24		960			
	Pump house	14x22		616			
	Stand pipe	12"		367			
	Well	12"		238			
	Total Pleasant Val. Brch.			$ 2 221			
	FORT COLLINS BRANCH						
Weld County, Dent	Depot—plat. & furn.	14x32		$ 436			
	C. H. & P.	8x16		40			
	Section house	24x32		464			
	Tool house	12x16		33			
	C. H. & P.	8x12		27			
	Jap house	14x34		100			
	Privy	4x4		5			
Milliken	Depot.—plat. & furn.	24x78		2 333			
	Stock yards	3 pens		183			
Koenig	C. H. & P.	8x12		27			
	Stock yards	2 pens		160			

	Stock scales	6 tons		72			
	Privy	4x4		5			
Larimer County, Harmony	Depot—plat. & furn.	24x78		2 333			
	C. H. & P.	8x16		40			
	Section house	24x32		464			
	C. H. & P.	8x16		40			
	Jap house	14x34		100			
	Stock yards	4 pens		200			
	Privy			5			
	Tool house	12x16		44			
Ft. Collins	Passenger depot	35x110		4 667			
	Freight depot	40x136		4 667			
	Water tank	19x24		960			
	Stand pipe & con.	12"		354			
	Engine house	8 stalls		11 000			
	Temp. coaling station			333			
	Turntable	80'		833			
	Stockyards	4 pens		200			
	Total Fort Collins Branch			$30 125			

UNION PACIFIC RAILROAD COMPANY
STATEMENT SHOWING VALUE OF CAR AND ENGINE EQUIPMENT ON JANUARY 1st, 1912.

Classification Passenger Equipment	Number	Average Value	Total Value
Baggage	106	$ 4,710.47	$499,309.88
Baggage and Mail	30	1,870.22	56,106.66
Baggage and Passenger	25	2,136.00	53,398.84
Baggage, Mail and Passenger	9	2,466.53	22,198.76
Business	17	5,370.45	91,297.71
Chair	87	7,541.49	656,109.80
Composite	1	3,770.64	3,770.64
Dining	43	11,401.00	490,246.00
Gasoline Motor Service			
Motors	19	15,719.00	298,660.30
Trailers	9	2,243.56	20,191.17
Instruction	3	2,483.25	7,449.75
Observation	14	14,381.83	201,345.59
Passenger	109	5,350.00	583,148.16
Postal	55	10,474.88	576,118.47
Total	527		$3,559,352.51
Freight Equipment			
Ballast	1,364	1,049.73	1,431,828.05
Box	8,391	550.11	4,615,988.25
Box Automobile	500	1,138.71	569,356.25
Caboose	310	651.23	201,880.00
Flat	766	694.61	532,072.10
Furniture	930	520.46	484,026.08
Gondola	1,330		420,757.13
Drop Bottom Gondola	646	462.25	416,824.94
Hopper Bottom Gondola	221		177,980.65
Refrigerator	42	251.89	10,579.13
Stock	2,315	341.76	891,167.72
Total	16,815		$9,752,460.30
Roadway and Miscellaneous			
Ballast	481	447.51	$209,321.46
Ballast Distributing	11		10,855.10
Boarding	1,318	150.27	198,056.85
Derrick	24	5,381.22	129,149.33
Pile Drivers	6	2,603.39	15,620.34
Roadway Box	168	150.28	25,247.42
Roadway Flat	135	119.28	16,102.88
Roadway Gondola	90	109.48	9,853.08
Roadway Water Cars and Auxiliary Tenders	128	581.71	74,458.48
Snow Plows	7	2,737.05	19,159.36
Steam Shovels	6	4,172.46	25,034.74
Tool	175	152.62	26,709.33
Miscellaneous	21	3,867.34	81,214.05
Total	2,570		$ 840,782.42
Total Car Equipment	19,912		$14,152,595.23
Locomotives	768	9,363.24	7,190,970.88
Locomotive Tenders-Extra	8	1,845.20	14,761.57
Grand Total	20,688		$21,358,327.68

THIS PAGE B

SCHEDULE No. 4

Showing a full list of rolling stock belonging to or operated by such railway company within and without the State of Colorado, setting forth the number, class and value of all locomotives, snow plows, flangers, wreckers, pile drivers and steam shovels, passenger cars, dining cars, buffet cars, sleeping cars or other palace cars, express cars, baggage cars, mail cars, box cars, cattle cars, coal cars, platform cars and all other kinds of cars, owned or used by said company. Locomotives, cars, etc., of same value may be aggregated, but those of different values separated.

DESCRIPTION	Gauge (Standard) (or Narrow)	Number	Average Class 1/3 Val. 1912	One-third Value 1912	DESCRIPTION	Gauge (Standard) (or Narrow)	Number	Class	Value
Locomotives		84	$3121	$262164					
Baggage		12	1570	18840					
Baggage and Mail		4	625	2500					
Baggage and Passenger		3	712	2136					
Baggage, Mail and Passenger		1	822	822					
Business		1	1790	1790					
Chair		9	2514	22626					
Dining		4	3800	15200					
Motor		6	5240	31440					
Observation		1	4819	4819					
Passenger		12	1783	21395					
Mail		6	3492	20952					
Box (inc. Furn. & Refrig'tor)		855	192	165150					
Caboose		27	217	5859					
Flat		66	231	15246					
Coal and Dump		190	154	29260					
Stock		201	114	22914					
Ballast and Roadway		195	252	49140					

SCHEDULE No. 4—Continued.

Boarding		114	50	$ 5700					
Derrick		2	1793	3586					
Pile Driver		1	868	868					
Snow Plow		1	912	912					
Steam Shovel		1	1390	1390					
Tool		15	51	765					
Water Tank		11	194	2134					
				$707609					

211A

SCHEDULE No. 5

Showing all machinery, tools, furniture and fixtures, fuel and supplies, personal property and all other property not otherwise listed, together with the values thereof, located within the State of Colorado.

	DETAILED DESCRIPTION		Taxable Value
Eastern District	Machinery and tools	$ 14 121	
	Furniture and fixtures	7 580	
	Fuel, supplies and material	67 163	$ 88864
Northern District	Furniture and fixtures	$ 1 800	
	Fuel, supplies and material	30 565	32365
Boulder Branch	Fuel, supplies and material		10
Julesburg Branch	Machinery and tools	$ 1 330	
	Furniture and fixtures	1 000	
	Fuel, supplies and material	10 063	12393
Nebraska Division	Machinery and Tools	- -	
	Furniture and fixtures		300
Other Branches	Furniture, fixtures and tools		2100
Principally at Sand Creek Junction	Construction material		51520
			187552

SCHEDULE No. 6

Showing a detailed description of all real and other property owned or controlled by such company or corporation within the State of Colorado, and not directly used in the operation of such road, and the actual value thereof.

Counties	Description of Lands and Lots and all other Property within the State of Colorado and not Used in the Operation of the Road.							Width in Feet	Acres	Taxable Value
	Part of Section or Name of Sub-Division or Addition	Name of Town or City Plat	Sec.	Twp.	Range	Lot Numbers	Block No.			
Denver	SW¼ NE¼ (except 46th avenue .92 acres, Wewatta street .83 acre, Twinging 3.00 acres, right of way 15.95 acres)		23	3	68				18.30	14640
	E 25 acres of NE¼ SW¼ (except right of way 16.32 acres and Wewatta street .68 acre)		23						8.00	8000
	N½ SE¼ (except 40th avenue 4.34 acres, Pullman shop grounds, now right of way 23.61 acres, tract assessed to Steel Tired Wheel Company 2.21 acres, right of way 33.72 acres)		23						16.12	12900
	Triangular piece in SW corner part SE¼ SE¼ bounded on S by S line Sec. 28, on W by part W boundary Hoyt & Robinson's Addition extended S on NE by SW side land conveyed to Denver Gas Company, and beginning at SE cor Block G East Denver th NW'ly along N line 18th Street 130 ft., th N 235.61 ft., th SE 297.48 ft to N line Wewatta Street,									

SCHEDULE No. 6—Continued.

	thence SW'ly 165.58 ft to beg (inc. Block G East Denver) and Block 3, Hoyt & Robinson's Addition		28	3	68						64200
In addition some right and unsold tions of w	n to above the company owns and pays t s of way for projected lines, unoccupied s and contracted lands and town lots and hich would be very voluminous and of pr	axes under loca urveys, ground coal reserves, t actically no use	l assess s at Ft. he deta to the	ments Morga iled de Board.	on n scrip-						
							Total	actual	value		

SCHEDULE No. 7

Statement of Gross Earnings upon road operated within the State of Colorado for the year ending December 31, 1911.
See explanation on last page under "Remarks."

Name of Line	From Passengers	From Freight	From Express Service	From Mail Service	From Telegraph Service	From Track Rent	From Car Rent	Miscellaneous	Total
Union Pacific R. R. Co.	1,605,950.84	3,121,152.79	148,278.34	118,555.75	11,723.20			114,719.12	5,120,380.04
TOTALS,									

SCHEDULE No. 7-A

Statement of Gross Earnings upon road operated within and without the State of Colorado for the year ending December 31, 1911.

Name of Line	From Passengers	From Freight	From Express Service	From Mail Service	From Telegraph Service	From Track Rent	From Car Rent	Miscellaneous	Total
Union Pacific R. R. Co.	10,656,672.40	33,210,031.36	1,145,891.28	2,103,195.83	70,920.74			1,138,513.12	48,327,224.73
TOTALS,									

OTHER SOURCES OF REVENUE. What is the amount of revenue received from any and all other sources, not above reported, including rents, interest and dividends upon stocks, bonds, loans, deposits or other property, within and without the State of Colorado? If you have no other revenue or receipts than those reported in Schedules 7 and 7-A, state the fact.

SCHEDULE No. 8

Description of Capital Stock	CAPITAL STOCK					Market Price Per Share
	Number of Shares Authorized	Par Value of Shares	Total Par Value Authorized	Total Amount Issued and Outstanding in Hands of Public	Amount Owned by Company	The average market price of shares of stock for the year ending on December 31, 1911
Common	2,961,787	100.—	296,178,700	216,644,300	2,000	Cannot furnish
Preferred	2,000,000	100 —	200,000,000	99,543,600	25,700	Cannot furnish

SCHEDULE No. 9
FUNDED DEBT
Mortgage Bonds, Miscellaneous Obligations, Income Bonds, Equipment Trust Obligations, Etc., December 31, 1911.

Description of each issue or series of Funded Debt and Equipment Obligations by name as designated in records of the Company.	TIME		Amount of Authorized Issue	Amount Issued & Outstanding in Hands of Public	Amount Owned by Company	INTEREST		Average Market Value for Year Ending December 31, 1911	Additions to the Funded Debt in hands of public from December 31, 1910, to December 31, 1911
	Date of Issue	When Due				Rate	Amount		
First Mortgage railroad and land grant	July 1, 1897	July 1, 1947	100,000,000	100,000,000	None	4%	4,000,000	Cannot furnish	None
First lien and refunding	June 1, 1908	June 1, 2008	200,000,000	57,803,700	None	4%	2,312,148	do	None
Twenty year convertible	July 1, 1907	July 1, 1927	75,000,000	36,738,300	1,238,000	4%	1,469,532	do	None

SCHEDULE No. 10

Statement of Operating Expenses (i. e., expenditures for maintenance, and operation, excepting taxes) for road within the State of Colorado, for year ending December 31, 1911. See explanation on last page under "Remarks"

Name of Line	Maintenance of Way and Structures	Maintenance of Equipment	Traffic Expenses	Transportation Expenses	General Expenses	Total Operating Expenses (Excluding Taxes)	Taxes
Union Pacific Railroad Co.	692,531.32	711,572.88	164,334.97	1,716,039.42	160,385.51	3,444,864.10	246,615.35

SCHEDULE No. 11

Operating Expenses (i. e., expenditures for maintenance and operation, excepting taxes) for entire system or road within and without this State for the year ending December 31, 1911.

Union Pacific Railroad Co.	5,339,495.82	5,486,298.22	1,267,039.17	13,230,835.98	1,236,588.36	26,560,247.55	1,952,552.99

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SCHEDULE No. 12

The taxes paid in each of the states in which the Railroad Company operated for the following years ending December 31, excluding United States Internal Revenue Taxes.

State or Territory	On Property Used in Railroad Operation					On Property not Used in Railroad Operation				
	1907	1908	1909	1910	1911	1907	1908	1909	1910	1911
Iowa	31,577.95	30,269.77	31,378.29	28,934.14	44,350.31	This would include taxes on Land Grant lands, townsite properties, coal properties and other auxiliary properties held through ownership of stocks and bonds, report of the taxes paid upon which would be difficult to make and probably would be of no use to the Board.				
Nebraska	492,712.17	514,160.97	578,112.44	646,326.69	677,205.23					
Wyoming	172,588.56	172,251.69	249,249.41	256,953.06	283,011.47					
Utah	37,924.97	42,479.50	41,952.79	45,110.27	59,005.96					
Missouri	7,016.97	6,670.26	6,838.84	9,029.70	9,576.49					
Kansas	349,286.59	336,839.54	376,913.82	356,623.62	407,141.99					
Colorado	182,551.83	196,781.91	214,385.40	240,959.47	246,615.35					

SCHEDULE No. 13

The entire Gross Earnings of the Railroad Company in Colorado for each month of the calendar year ending December 31, 1911

MONTH	AMOUNT
January	410140.77
February	359175.13
March	416298.69
April	394099.48
May	393369.38
June	379708.47
July	391172.35
August	452120.67
September	475813.42
October	538896.31
November	480424.37
December	429161.00
TOTAL	5120380.04

The entire Gross Earnings for the whole system, within and without this State, for each month of the calendar year ending December 31, 1911

MONTH	AMOUNT
January	3623577.21
February	3249127.23
March	3641199.29
April	3772622.79
May	4002884.58
June	3951488.26
July	3927611.78
August	4354572.23
September	4092263.11
October	4910679.44
November	4275542.34
December	3925656.47
TOTAL	48327224.73

SCHEDULE No. 14

DIVIDENDS. Rate and amount of dividends paid for each year, ending on December 31, for the following years:

SCHEDULE No. 14.

Dividends. Rate and amount of dividends paid for each year, ending on December 31, for the following years:

Description of Capital Stock	1905		1906		1907		1908		1909		1910		1911	
	Rate	Amount	Rate	Amount	Rate	Amount	Rate	Amount	Rate	Amount	Rate	Amount	Rate	Amount
Common	4½%	7,104,250.50	8%	15,550,392.00	10%	19,548,040.00	10%	19,548,799.00	10%	19,678,327.22	10%	21,657,326.69	10%	21,664,430.00
Preferred	4%	3,982,356.00	4%	3,981,764.00	4%	3,981,764.00	4%	3,981,784.00	4%	3,981,760.00	4%	3,981,760.00	4%	3,981,744.00

SCHEDULE No. 15.

The President or other chief officer of every railroad company whose lines run through or into this State, shall, between the first day of March and the first day of April in each year, furnish to the State Board of Equalization and file with its clerk a statement verified by the affidavit of the officer or person making the same, showing the total number of miles made by the cars of every such express car company, mercantile or other company, firm or individual, over their lines in this State during the year next preceding the 31st day of December then last past. Such statement shall also show, separately, the name and aggregate number of miles traveled over their lines in this State, by the cars of each such car company, car trust, mercantile or other company, firm or individual.

Name of Express Car Company, Firm or Individual, Palace and Sleeping Car Companies, Fast Freight, Mercantile, Car Trust or Other Company.	Kind of Cars	Car Days	Aggregate Number of Miles Traveled by Cars Within the State of Colorado	Average Number of Miles Traveled per Day per Car	Name of ExpressCarCompany, Firm or Individual, Palace and Sleeping Car Companies, Fast Freight, Mercantile, Car Trust or Other Company.	Kind of Cars	Car Days	Aggregate Number of Miles Traveled by Cars Within the State of Colorado	Average Number of Miles Traveled per Day per Car
Alfalfa Meal Company	Tank		748		Swift Rfgr. Line	Rfgr.		26085	
Arms Palace Horse Car Co.	Stock		13681		Swift Tank Line	Tank		4389	
American Fast Freight Line	Tank		2290		Swift Live Stock Express	Stock		291	
American Linseed Oil Co.	Tank		2287		Solvay Process Co.	Tank		203	
Archer-Daniels Linseed Co.	"		1970		St. Louis Ind. Packing Co.	Rfgr.		287	
Armour & Co.	Box		4415		Summers Steel Car. Co.	Coal		94	
Am. Refg. Transit Co.	Refg.		12907		Starks Heater Car Co.	Rfgr.		94	
" " " "					Tropical Refg. Express	Fruit		3027	
(St.L.&S.W. in leased service)	"		6123		Titusville Oil Works	Tank		574	
Armour Refg. Line	"		65855		Trinity Cotton Oil Co.	"		2870	
Alfalfa Product Co.	Tank		4988		Union Tank Line	"		412982	
Armour Tank Line	"		1660		Union Refg. Transit Co.	Refg.		43695	
Anglo-American Tar Product Co.	"		188		Union Petroleum Co.	Tank		1148	

SCHEDULE No. 15—Continued.

Amco Express Tank Line	"		2932		Venice Transportation Co.	Flat		306	
Atlantic Seaboard Despatch	Rfgr.		5277		Vinita Producing Refining Co.	Tank		486	
American Cotton Oil	Tank		856		Wolff Refg Line	Refg.		18052	
Beachnut Packing Co.	Rfgr.		197		Western Chemical & Mfg. Co.	Tank		396	
Cudahy Oil Tank Line	Tank		574		Warren Bros. Co.	"		287	
Canfield Oil Co.	Tank		381		Westinghouse Elec.&Mfg. Co.	Flat		1148	
Craig Oil Co.	"		94		Western Heater Despatch	Rfgr.		8461	
Cold Blast Trans. Co.	Rfgr.		4541		Wabash Refining Co.	Tank		577	
Case J. I. T. M. Co.	Flat		873						
Cudahy Rfgr. Line	Rfgr.		37808						
Continental Fruit Express	Fruit		5123						
Chelsea Refining Co.	Tank		574		#The Pullman Company #				
Cudahy Milwaukee Rfgr. Line	Rfgr.		674		Standard Sleeping Cars	Sleepers		2053548	
Cudahy Oil Refining Co.	Tank		991		Tourist Sleeping cars	"		822227	
Chicago Rfgr. Despatch	Rfgr.		485						
Central Refining Co.	Tank		2395		# Includes following mileage made by C.M.& St.P.Ry. Sleeping Cars				
Chicago, N.Y.&Boston Rfgr. Co.	Rfgr.		1501						
Carston's Rfgr. Line Thos	"		287						
Chanute Refining Co.	Tank		188		Standard Sleeping Cars	"		1834933	
Doud Stock Car Co.	Stock		2643		Tourist Sleeping Cars	"		247	
Diamond Car Line	Tank		386						
Dairy Shippers Despatch	Refgr.		484						
Fruit Growers Express	Fruit		183196						
Fox River Despatch Co.	Rfgr.		197						
Fidelity Cotton Oil&Fert.Co.	Tank		287						
Franklin Refinery Tank Car Line	"		1148						
Grayson Oil & Cotton Co.	"		1445						

Unable to furnish | Unable to furnish | Unable to furnish | Unable to furnish

Heinz Co. H. J.	Rfgr		788								
Heinz Food Products Line	"		1554								
Independent Refining Co. Ltd.	Tank		94								
Kansas Oil Refining Co.	"		386								
Kerns Live Stock Express	Stock		5857								
Kansas Oil Tank Co.	Tank		772								
Live Poultry Transportation Co.	Chicken		21632								
Libby, McNeill & Libby Rfgr. Line	Rfgr.		2433								
Lemac Carriers Co.	Chicken		2261								
Lemps Rfgr Co.	Rfgr.		15406								
Merchants Despatch Trans. Co.	"		26360								
Missouri River Despatch	"		5196								
Milwaukee Rfgr. Transit Co.	"		4185								
Morris & Co. Rfgr. Line	"		16791								
Mather Horse & Stock Car Co.	Stock		19182								
Midland Linseed Despatch	Tank		2668								
Menasha Woodenware Co.	Furn.		3443								
Mather Rfgr. Express	Rfgr.		291								
Morton-Gregson Car Lines	"		94								
National Car Line Co.	"		53941								
do	Tank		3120								
Northern Tank Line	"		2364								
National Roofing Co.	"		394								
Peters Co. M. C.	"		9205								
Peerless Tank Line	"		775								
Petroleum Products Co.	"		888								
Pacific Fruit Express Co.	Fruit		2786789								
Proctor & Gamble Transpn. Co.	Tank		757								
Quaker City Lv. Stock Line	Stock		11304								

SCHEDULE No. 15—Continued.

Shippers Refrigerating Car Co.	Rfgr.		1821							
Streets Western Stable Car Line	Stock		4370							
Santa Fe Refgr. Despatch Co.	Fruit		41608							
St. Louis Rfgr. Car Co.	Rfgr.		102336							

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STATE OF.....Nebraska.....
County of.....Douglas..... } ss.

.....H. J. Stirling....., being duly sworn, upon his oath says, he is the.....Auditor..... of the Union Pacific Railroad Company and that the foregoing statement respecting the total mileage and daily average mileage of express, sleeping and private and other line cars over said company's road for the year ending December 31st, 1911 required under the laws of the State of Colorado, relating to the taxation of the cars of private and other car lines, is true and correct to the best of his information, knowledge and belief.

Subscribed and sworn to before me this.....27th.....day of.....February....., 1912. ....H. J. Stirling, Auditor.....

(Seal) .....F. C. Bullock.....

My commission expires....Dec. 1, 1912..... ....Notary Public.....

216 SCHEDULE No. 16—Recapitulation. (This Recapitulation relates to the property, earnings, expenses, etc., of the road in Colorado.)

Name of Line	Miles of Road		Taxable Value of Property Used in Operating Road in Colorado						Taxable Value of Property per Mile of Road in Colorado
	In Colorado	Entire Length	Lands and Town Lots Listed in Land Record	Road (Schedule 1)	Buildings, Etc. (Schedule 3)	Rolling St'ck (Schedule 4)	Material, Machy. Tools, Supplies, etc.	Total	
Union Pacific Railroad Co. Proper.									
Average for the year	576.84	3489.60							
On Dec. 31, 1911	583.20	3537.13							
Eastern District	194.14		769,322.31	1,133,780.00	48,253.00		88,864.00		
Northern "	91.48		218,538.75	651,100.00	123,502.00		32,365.00		
Boulder Branch	26.53		11,791.92	109,770.00	1,323.00		10.00		
Julesburg "	151.53		74,034.46	901,975.00	46,813.00		12,393.00		
Nebraska "	8.86		9,354.00	76,380.00	8,702.00		300.00		
Denver Northern Branch	45.26		41,190.80	243,840.00	6,333.00				
Greeley Branch	26.16		11,597.20	116,100.00	7,292.00				
Pleasant Valley Branch	14.15		7,049.60	61,640.00	2,221.00				
Fort Collins "	25.09		55,397.00	132,080.00	30,125.00		53,620.00		
			1,198,276.04	3,426,665.00	174,564.00	707,609.00	187,552.00	5,694,666.04	9,764.52

SCHEDULE No. 16-A—(Lines in State of Colorado, only.)

Name of Line	Gross Earnings (Schedule 7)		Operating Expenses (Schedule 10)		Net Earnings or Loss				Taxes Paid in 1911 excl. Federal Income Tax.
					Net Earnings		Loss		
	Total	Per Mile	Total	Per Mile	Total	Per Mile	Total	Per Mile	
Union Pacific Railroad Co.	5,120,380.04	8876.59	3,444,864.10	5971.96	1,675,515.94	2904.63			246,615.35
			Less taxes		246,615.35				
					1,428,900.59	2477.12			

SCHEDULE No. 16-B—(Entire System.)

Name of System	Gross Earnings (Schedule 7-A)		Operating Expenses (Schedule 11)		Net Earnings or Loss				Taxes Paid in 1911 incl. Federal Income Tax.
					Net Earnings		Loss		
	Total	Per Mile	Total	Per Mile	Total	Per Mile	Total	Per Mil	
Union Pacific Railroad Co. Proper	48,327,224.73	13848.93	26,560,247.55	7611.26	21,766,977.18	6237.67			1,952,552.99
Union Pacific System (Year ending June 30, 1911)									
Average miles operated 6,678.29	88,983,107.81	13324.24	49,807,833.99	7458.18	39,175,273.82	5866.06			

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REMARKS

☛Enter any necessary explanation of items in the Schedules corresponding with the respective numbers.

Schedule Nos. 7 and 10. The figures as shown under these schedules are arrived at by using the bases prescribed by the State Railroad Commission for the State of Colorado. The Company certifies to the correctness of the figures reported herein ascertained according to the formulae as prescribed, but in so doing it is not to be understood as endorsing or approving the correctness of the formulae.

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STATE OF....Nebraska.....
} ss.
COUNTY OF....Douglas.....

I,.....A. W. Scribner..... being duly sworn, upon my oath say that I am the.....Tax Commissioner.....of the.....Union Pacific Railroad Company.....; that I have prepared the foregoing schedules numbered 1 to 16, inclusive; that the report contained in said schedules is complete, true and correct, according to the best of my knowledge, information and belief.

.....A. W. Scribner.....

Subscribed in my presence and sworn to before me, a Notary Public in and for said county and State, by.....A. W. Scribner..... on this the.....4th.....day of.....April.....A. D. 1912. My commission expires.....Febr. 8,.....1917..

In witness whereof, I have hereunto set my hand and seal of office.

(Seal)

.....Arthur H. Scribner.....
Notary Public.

217 Endorsed: Plaintiff's Exhibit "A". Filed Sep. 16, 1913. Charles W. Bishop, Clerk.

Plaintiff's Exhibit No. B.

Case No.

SHELDON E. TUCKER,
Secretary.

Members of Commission:
J. Frank Adams, Chairman.
Celsus P. Link
John B. Phillips,

State of Colorado.

Office of Colorado Tax Commission.

Denver, Colorado, August 7th, 1913.

I hereby certify that the attached abstract of assessment of Weld County is a true and correct copy of the original, sworn to by the assessor of such county, now on file in the office of the Colorado Tax Commission.

THE COLORADO TAX COMMISSION,
By S. E. Tucker,
Secretary.

Abstract of Assessment.

Weld County, State of Colorado, for the year A. D. 1912 as required by law.

Adopted by the State Board of Equalization, October 18, 1909.

Number of	Average Value Per Acre	Property	Valuation
		AGRICULTURAL LAND	
		Acres of Improved Fruit Land	
266,871		" " Irrigated Land	5,572,310
13,024		" " Natural Hay Land	198,120
21,407		" " Dry Farming Land	102,480
		Improvements on above Lands	1,103,160
		GRAZING LAND	
964,302		Acres of Grazing Land	2,188,230
		Improvements on Grazing Land	200,120
		COAL LAND	
8,904		Acres of Productive Coal Land	267,556
7,122		" " Non-productive Coal Land	72,140
218		Improvements on Productive Coal Land	
8,360		Coal Reserves	48,720
		OIL LAND	
		Acres of Oil Land	
		Improvements on Oil Land	

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Number of	Average value per acre.	Property.	Valuation.
		Other Mineral Land.	
		Acres of other Mineral Land and the kind thereof	.....
		Improvements on other Mineral Land	.....
		Mining Claims.	
		Acres of Metalliferous Mining Claims (non-producing)	.....
		Improvements on Metalliferous Mining Claims	.....
		Assessment on Gross Output from Metalliferous Mining Claims (Gross Val., $—)	.....
		Assessment on Net Output from Metalliferous Mining Claims (Gross Val., $—)	.....
		Public Lands.	
		Improvements on Public Lands	60,110
		Town and City Lots.	
		Town and City Lots	1,430,030
		Improvements on Town and City Lots	1,872,600
		Railroad Property (Assessed Locally).	
		Railroad Property not returned by the State Board of Equalization	19,060
	Average per head.	**Live Stock.**	
15,890		Horses	545,260
1,498		Mules	80,340
219		Asses	.....
10,542		Range Cattle	120,680
8,116		Dairy Cattle	178,260
29,260		Sheep	45,600
2,584		Swine	15,210
		Goats	.....
1,670		All other Animals, Bees	1,700
	Average per item.	**Vehicles, etc.**	
56		Bicycles and Motorcycles	2,050
294		Automobiles	60,140
5,094		Carriages and Vehicles of every description	75,090
762		Musical Instruments	49,670
147		Clocks and Watches	1,320
		Moneys, Credits, etc.	
		Cash Value Bank Deposits in State	18,940
		Cash Value Bank Deposits out of State. Amount of Money, Credits, Book Accounts and other accounts not evidenced by writing. Cash Value Promissory Notes, Bonds, Debentures and all other written evidence of indebtedness. Cash Value Special Privileges and Franchises not included in other items.	1,400

Partly estimated.

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Miscellaneous.

Average Amount of Money Invested in Merchandise	792,680
Amount of Capital Employed in Manufactures	
Jewelry, Gold and Silver, Diamonds, and other precious stones	840
Household Property, Libraries, Furniture and Fixtures	204,170
All other Property	243,430
Bank Stock or Shares in any Bank (less Amount Invested in Real Estate)	370,400
Stock or Shares in any Corporation doing business in the State	.....
Total Assessment by the Assessor	15,941,810
Deduct Amount of Personal Property exempt per Constitutional Amendment 1904	520,600
Total Net Assessment by the Assessor	15,421,210
Miles of Railroads as returned by the State Board of Equalization	4,610,700
Miles of Telegraph Lines as returned by the State Board of Equalization	81,540
Miles of Telephone Lines as returned by the State Board of Equalization	205,890
All other Property returned by the State Board of Equalization	119,370
Grand Total	20,438,710

Number of Military Polls, 3,271.

[Assessor-] are Instructed to Follow the Above Form Absolutely and not to Combine any of the Items.

ROADY KENEHAN, *Auditor.*

Affidavit of Assessors to Assessment Roll.

STATE OF COLORADO,
City and County of Denver, ss:

I, A. R. Fischer, the Assessor of Weld County, Colorado, do solemnly swear that in the above and foregoing assessment roll I have assessed all the taxable property in the county of Weld for the current year, and at the true value thereof.

A. R. FISCHER.

Subscribed and sworn to before me this 3rd day of September, A. D. 1912.

M. A. LEDDY, *Auditor of State.*
T. E. McILDUFF, *Deputy.*

189 I hereby certify that I have examined the above and foregoing abstract of assessment for the County of Weld and find the same to be correct in form.

M. A. LEDDY, *Auditor of State.*
T. E. McILDUFF, *Deputy.*

Dated at Denver, Colorado, this 3rd day of September A. D. 1912.

Endorsed: Plaintiff's Exhibit "B." Filed Sep. 16, 1913. Charles W. Bishop, Clerk.

PLAINTIFF'S EXHIBIT No. C.

Members of Commission: J. Frank Adams, Chairman; Sheldon E. Tucker, Secretary; Celsus P. Link, John B. Phillips.

STATE OF COLORADO:

Office of Colorado Tax Commission.

DENVER, COLORADO, August 20, 1913.

Assessments of Public Utilities in Weld County.

	Assessments, 1912, as reported to tax commission by assessor.	Assessments by tax commission, 1913.
Eaton Electric Company.....	$2,050	$34,700
Fort Lupton Light & Power Co...	500	3,600
Greeley & Denver Railway Co....	9,300	75,960
Home Gas & Electric Co. Greeley..	7,200	108,700
Totals.....	$19,050	$222,960

I hereby certify that the above figures are those submitted to the Colorado Tax Commission by the Assessor, also the assessments made by said Commission.

[Seal Colorado Tax Commission.]

THE COLORADO TAX COMMISSION,
S. E. TUCKER, *Secretary.*

Endorsed: Plaintiff's Exhibit "C." Filed Sep. 16, 1913. Charles W. Bishop, Clerk.

Statement Showing Average Bank Deposits in Weld County for the Year Ending April 1, 1912.

National Banks.	Deposits, 6/7/11.	Deposits, 9/1/11.	Deposits, 12/5/11.	Deposits, 2/20/12.	Average deposits.	Total average deposits.
First National, Ault	$34,493.00	$33,262.13	$35,242.80	$38,244.41	$35,310.58	
Farmers National, Ault	.....	.....	99,889.46	.....	99,889.46	
Eaton National, Eaton	75,783.90	87,156.05	88,515.05	82,306.49	83,440.37	
First National, Eaton	153,234.85	156,658.70	172,119.47	113,687.43	141,925.11	
First National, Gill	8,361.72	11,870.48	.....	.....	10,116.10	
City National, Greeley	.....	.....	104,354.65	88,941.09	96,648.37	
First National, Greeley	619,471.98	653,398.61	636,994.45	553,521.92	615,846.74	
Greeley National, "	492,460.81	515,916.74	543,001.69	509,124.97	515,126.05	
Union National, "	.....	284,828.96	269,926.44	233,331.80	262,695.73	
First National, Johnstown	.....	127,548.37	112,060.06	.....	119,804.21	
Platteville National, Platteville	95,013.02	98,160.14	122,625.59	128,030.27	110,957.25	
Farmers National, Windsor	.....	47,471.21	.....	.....	47,471.21	
First National, Windsor	106,028.69	111,786.87	171,746.99	120,825.16	127,596.93	
						$2,273,828.11
State Banks.	1/7/11.	6/7/11.	12/5/11.	2/20/12.		
Erie State Bank, Erie	47,968.19	56,564.81	65,590.81	58,215.49	57,084.84	
Farmers & Merchants, Evans	56,976.23	32,166.55	55,408.93	45,724.93	47,569.16	
Ft. Lupton State, Ft. Lupton	136,612.03	94,885.81	147,374.74	145,740.05	131,153.16	
Weld County Savings, Greeley	248,099.48	245,316.07	260,994.33	240,124.73	248,633.65	
Grover State, Grover	26,282.08	22,362.58	16,179.13	17,682.04	20,626.46	
Hudson State, Hudson	9,388.44	37,426.45	70,478.71	39,780.86	39,268.61	
Kersey State, Kersey	37,055.37	31,091.28	41,490.33	39,142.75	37,194.93	
La Salle State, La Salle	27,918.87	23,425.76	26,861.04	27,501.07	26,426.68	
1st State, Milliken	32,954.10	31,503.18	21,707.83	17,004.41	25,792.38	
1st State, Nunn	22,021.78	19,673.91	24,276.04	12,585.73	19,639.39	
Pierce State, Pierce	21,484.08	12,205.41	20,009.59	44,060.53	24,439.90	
Severance State, Severance	19,420.52	26,819.64	22,435.67	19,288.72	21,991.14	
						690,820.30
Total National & State Banks	.....	.....	.....	.....	.....	$2,973,648.41

(Endorsed:) Plaintiff's Exhibit "D." Filed Sept. 16, 1913. Charles W. Bishop, Clerk.

191 PLAINTIFF'S EXHIBIT NO. E.

Members of Commission: J. Frank Adams, Chairman; Sheldon E. Tucker, Secretary; Celsus P. Link, John B. Phillips.

STATE OF COLORADO:

Office of Colorado Tax Commission.

DENVER, COLORADO, August 30, 1913.

I hereby certify that the attached abstract of assessment of Weld County for the year 1910, is a true and correct copy of the original, now on file in this office.

THE COLORADO TAX COMMISSION,
S. E. TUCKER, *Secretary.*

Abstract of Assessment.

(Assessors are instructed to follow this form absolutely and not to combine any of the items.)

Weld County, State of Colorado, for the Year A. D. 1910, as Required by Law.

Adopted by the State Board of Equalization, October 18, 1909.

Number of	Average value per acre.	Property.	Valuation.
		Agricultural Land.	
		Acres of Improved Fruit Land.....	.....
249,135	21.34	Acres of Irrigated Land.....	5,317,920
12,040	15.80	Acres of Natural Hay Land.....	190,240
31,412		Acres of Dry Farming Land.....	154,290
		Improvements on above Lands.....	1,032,910
		Grazing Land.	
898,303	2.25	Acres of Grazing Land.....	2,025,730
		Improvements on Grazing Land.....	218,140
		Coal Land.	
9,214	26.84	Acres of Productive Coal Land.....	247,370
3,861	10.96	Acres of Non-productive Coal Land.....	42,290
		Improvements on Productive Coal Land.....	19,200
		Improvements on non-productive Coal Land..	.....
		Oil Land.	
		Acres of Oil Land.....	.....
		Improvements on Oil Land.....	.....

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		Other Mineral Land.	
		Acres of other Mineral Land and the kind thereof	.....
		Improvements on other Mineral Land	.....
		Mining Claims.	
		Acres of Metalliferous Mining Claims (non-producing)	.....
		Improvements on Metalliferous Mining Claims	.....
		Assessment on Gross Output from Metalliferous Mining Claims (Gross Val. $—)	.....
		Assessment on Net Output from Metalliferous Mining Claims (Gross Val. $—)	.....
		Public Lands.	
		Improvements on Public Lands	52,670
		Town and City Lots.	
		Town and City Lots	1,590,870
		Improvements on Town and City Lots	1,741,980
		Railroad Property (Assessed Locally)	51,240
		Railroad Property not returned by The State Board of Equalization	.....
	Average per head.	**Live Stock.**	
15,664		Horses	632,070
1,444		Mules	77,210
		Asses	.....
15,530		Range Cattle	154,160
8,110		Dairy Cattle	143,380
43,849		Sheep	68,250
4,016		Swine	19,030
		Goats	.....
1,650		Bees	1,680
	Average per item.	**Vehicles, etc.**	
97		Bicycles and Motorcycles	1,520
160		Automobiles	35,270
6,085		Carriages and Vehicles of every description	113,220
891		Musical Instruments	57,850
203		Clocks and Watches	2,240

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	Moneys, Credits, etc.	
	Cash Value Bank Deposits in State	.....
	Cash Value Bank Deposits out of State	.....
	Amount of money, Credits, Book Accounts and other accounts not evidenced by writing	54,270
	Cash Value Promissory Notes, Bonds, Debentures, and all other written [edidences] of indebtedness	.....
	Cash Value Special Privileges and Franchises not included in other items	.....

Miscellaneous.

	Average Amount of Money Invested in Merchandise	765,300
	Amount of Capital Employed in Manufactures	.....
	Jewelry, Gold and Silver, Diamonds and other Precious stones	3,800
	Household property	308,180
	Libraries	3,210
	Furniture and Fixtures	14,680
	All other Property	16,060
	Bank Stock or shares in any bank (Less Amount invested in Real Estate)	307,060
	Stock or shares in any corporation doing business in the State	.....
	Total Assessment by the Assessor	15,472,170
	Deduct Amount of Personal Property exempt per constitutional Amendment 1904	570,200
	Total Net Assessment by the assessor	14,901,970
317.39	Miles of Railroads as returned by the State Board of Equalization	3,750,880
194		
1,900.65	Miles of Telegraph Lines as returned by the State Board of Equalization	57,300
7,260.66	Miles of Telephone Lines as returned by the State Board of Equalization	125,870
	All Other Property returned by the State Board of Equalization	98,570
	Grand Total	18,934,590
	Number of Military Polls	3,911

[Assessor-] are instructed to follow the above form absolutely and not to combine any of the items.

ROADY KENENHAN, *Auditor.*

Affidavit of Assessor to Assessment Roll.

STATE OF COLORADO,
City and County of Denver, ss:

I, A. R. Fischer, the Assessor of Weld County, Colorado, do solemnly swear that in the above and foregoing Assessment Roll I have assessed all the taxable property in the County of Weld for the current year, and at the true value thereof.

A. R. FISCHER.

Subscribed and sworn to before me this 2nd day of September A. D. 1910.

ROADY KENENHAN,
Auditor of State.
THOS. E. McILDUFF, *Deputy.*

I hereby certify that I have examined the above and foregoing abstract of Assessment for the County of Weld and find the same to be correct in form.

ROADY KENENHAN,
Auditor of State.
THOS. E. McILDUFF, *Deputy.*

Dated at Denver, Colorado, this 2nd day of September, A. D. 1910.

Endorsed: Filed in the District Court on Sept. 16, 1913.

195 PLAINTIFF'S EXHIBIT No. F.

Members of Commission: J. Frank Adams, Chairman; Sheldon E. Tucker, Secretary; Celsus P. Link, John B. Phillips.

STATE OF COLORADO:

Office of Colorado Tax Commission.

DENVER, COLORADO, August 30, 1913.

I hereby certify that the attached abstract of assessment of Weld County for the year 1911, is a true and correct copy of the original, now on file in this office.

THE COLORADO TAX COMMISSION.
S. E. TUCKER, *Secretary.*

(Assessors are instructed to follow this form absolutely and not to combine any of the items.)

Abstract of Assessment.

Weld County, State of Colorado, for the Year A. D. 1911, as Required by Law.

Adopted by the State Board of Equalization October 18, 1909.

Number of	Average value per acre.	Property.	Valuation.
		Agricultural Land.	
		Acres of Improved Fruit Land.....	.....
255,169		Acres of Irrigated Land.....	5,341,760
12,099		Acres of Natural Hay Land.....	191,320
19,841		Acres of Dry Farming Land.....	98,620
		Improvements on above lands.....	1,094,690
		Grazing Land.	
950,551		Acres of Grazing Land.....	2,192,160
		Improvements on Grazing Land.....	188,020

Coal Land.

912	Acres of Productive Coal Land	255,980
7,320	Acres of Non-Productive Coal Land	68,740
	Improvements on Productive Coal Land	36,800
	Improvements on 8,440 Acres Coal Reserve	49,120

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Oil Land.

	Acres of Oil Land	.....
	Improvements on Oil land	.....

Other Mineral Land.

	Acres of other Mineral Land and the kind thereof	.....
	Improvements on other mineral land	.....

Mining Claims.

	Acres of Metalliferous Mining Claims (non-producing)	.....
	Improvements on Metalliferous Mining Claims	.....
	Assessment on Gross Output from metalliferous mining claims (Gross Val., $—)	.....
	Assessment on Net Output from Metalliferous Mining Claims (Gross Val., $—)	.....

Public Lands.

	Improvements on Public Lands	50,200

Town and City Lots.

	Town and City Lots	1,449,830
	Improvements on Town and City Lots	1,833,290
	Railroad Property (Assessed Locally)	2,410
	Railroad Property not returned by the State Board of Equalization	.....

Live Stock.

Average per head.		
15,664	Horses	539,370
1,476	Mules	64,400
	Asses	.....
11,746	Range Cattle	127,080
7,418	Dairy Cattle	132,420
31,441	Sheep	49,450
2,302	Swine	13,050
1,277	Bees	1,720
	All other animals	11,520

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Vehicles, etc.

Average per item.		
37	Bicycles and Motorcycles	620
249	Automobiles	51,880
5,343	Carriages and Vehicles of every description	88,540
731	Musical Instruments	46,710
125	Clocks and Watches	1,100

Moneys, Credits, etc.

	Cash Value Bank Deposits in State	17,750
	Cash Value Bank Deposits out of State	.....
	Amount of Money, Credits, Book Accounts and other accounts not evidenced by writing	.....
	Cash Value Promissory Notes, Bonds, Debentures and all other written evidences of indebtedness	1,400
	Cash Value Special Privileges and Franchises not included in other items	.....

Miscellaneous.

	Average Amount of Money invested in Merchandise	798,920
	Amount of Capital Employed in Manufactures	.....
	Jewelry, Gold and Silver, Diamonds and other Precious Stones	840
	Household Property Libraries Furniture and Fixtures	139,800
	All other property	148,140
	Bank Stock or shares in any bank (less amount invested in Real estate)	293,240
	Stock or shares in any corporation doing business in the State	.....
	Total Assessment by the Assessor	15,402,650
	Deduct amount of Personal property exempt per constitutional Amendment 1904	512,800
198		
	Total Net Assessment by the Assessor	14,889,850
399.47	Miles of Railroads as returned by The State Board of Equalization	4,578,840
2,795.48	Miles of Telegraph Lines as returned by The State Board of Equalization	87,280
11,576.17	Miles of Telephone Lines as returned by the State Board of Equalization	199,300
	All other property returned by the State Board of Equalization	102,260
	Grand Total	19,857,590
	Number of Military Polls	4,396

Assessors are Instructed to Follow the Above Form Absolutely and Not to Combine Any of the Items.

ROADY KENENHAN, *Auditor.*

Affidavit of Assessors to Assessment Roll.

STATE OF COLORADO,
City and County of Denver, ss:

I, A. R. Fischer, the assessor of Weld County, Colorado, do solemnly swear that in the above and foregoing assessment roll I have assessed all the taxable property in the County of Weld for the current year, and at the true value thereof.

A. R. FISCHER.

See Revenue Law, 1902.

Tax Schedule

Place
Place
Occu

PRICE PER ACRE			ACRES			NO. OF LOTS OR DESCRIPTION O
Agr'l	Grass	Min'l	Agr'l	Grass	Min'l	NOTE—List "Lands" by legal sub-divisions; L by Number and Block; "Mining Claims" provements and machinery on same must be
						22' W. front
						City System & Mdse. Eaton
						" " " " Ault
						28 miles line
						2 miles
						2¼ "
						11 "
						5 "
						2 "
						3 "
						1 "
						1¼ "
						Franchise

True copy

L. L. H.

NOTICE All Schedules should be filled out and returned to an authorized Deputy or to the Assessor at Weld County Court House, at once, but not later than May 20th, 1912. See Revenue Laws on back of Schedule. READ THE SCHEDULE CAREFULLY before subscribing to the oath.

A. R. FISCHER, Assessor.

Eaton

Of all property owned, controlled and held in WELD COUNTY, COLO., for the year 1912 By Eaton Electric Co.

Plaintiff's Exhibit No. G.

No. 261

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VALUATIONS					PERSONAL PROPERTY			
ral	Grazing Land	Mineral Land Lots	Improvements	School Dist.	If no property is owned under any item the word "none" must be written opposite such item	VALUATION	School Dist.	CITY OR TOWN
		30	150	37	Aggregate cash value of all prom. notes bonds, stocks, debentures and other written evidence of indebtedness. $			
			450	"				
			200	"	Aggregate cash value of amount due upon book accounts and other accounts not evidenced by writing, $			
			1000		Average cash deposits in Banking institutions, $			
					GROSS TOTAL, $			
				6	Deductions allowed by law, $			
				59				
				37	Net total money, notes and credits, $			
				34	Merchandise and Mfgrs., average value,			
				40	Value of furniture and fixtures,			
				60	Value of Household Goods and Furniture,			
				77	Value of Diamonds, Jewelry, Gold and Silver Plate.			
				90	NUMBER Value of Musical Instruments,			
					Value of Clocks and Watches,			
			400		Value of Bicycles or Motorcycles			
					Value of Automobiles,			
					Value of Agricultural Implements,			
					Value of all Road Vehicles,			
					Value of Swine,			
					Value of Sheep,			
					Value of Horses,			
					Value of Mules,			
					Value of Cattle,			
					Value of Bees,			
					Value of all other Animals,			
					Value of all other property o any kind not hereinbefore specifically enumerated.			
					Value of special privileges and franchises not assessed in connection with other property.			
					GROSS TOTAL,			
					Exemtion on personal property allowed by law to every person being the head of a family,	$300		
					NET TOTAL,			
					Are you the head of a family?			
					Military Poll,			

STATE OF COLORADO, } ss.
COUNTY OF WELD. }

I, ...
being duly sworn, say that to the best of my knowledge, information and belief, the foregoing schedule contains a true, full and complete list of all property held by or belonging to me on the first day of April of this year, including all moneys due me and the particular sums due me on that date, the average amount of money on hand, and the average value which I held in merchandise or manufactures during each calendar month of the year ending on the 31st day of March last past, whether on hand or owned by me, and all intangible property, whether having a value by itself or in connection with other property; that such property has been by me fully and fairly described to the assessor and its true condition and value represented. That I have in no case sought to mislead the assessor as to either quantity, quality or value of property, and that the deductions claimed from credits are BONA FIDE debts for a consideration received, and do not consist in any part in bonds, notes or obligations of any kind given to any insurance company on account of premiums on policies, or on account of any unpaid subscriptions to any literary, scientific, charitable or other like institution or society, or on account of any subscription due or indebtedness payable on capital stock in any company, whether incorporated or unincorporated, or on account of any obligation signed by me as surety for another; and I further swear that since the first day of April of last year I have not, directly or indirectly, converted or exchanged any of my property temporarily into bonds, treasury notes, or other securities of the United States, or into other non-taxable property or securities of any kind, save as in the said schedule set forth. I further swear that I have, to the best of my knowledge and belief, valued said property at its full cash value.

.....
Principal.

.....
Agent.

Subscribed and sworn to before me this .....

day of .....*A. D. 1912.*

A. R. FISCHER, ASSESSOR.

By .....
Deputy.

Subscribed and sworn to before me this 30th day of August A. D. 1911.

M. A. LEDDY,
Auditor of State.
—— ——, *Deputy.*

I hereby certify that I have examined the above and foregoing Abstract of Assessment for the County of Weld and find the same to be correct in form.

M. A. LEDDY,
Auditor of State.
—— ——, *Deputy.*

Dated at Denver, Colorado, this 30th day of August A. D. 1911.

Endorsed: Filed in the District Court on Sept. 16, 1913.

(Here follows tax schedule marked page 198½.)

199 DEFENDANTS' EXHIBIT 3.

The Keota News.

* * * * * * *

Notice for Publication—Isolated Tract.

018,212.

Public Land Sale.

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE AT STERLING,
COLORADO, July 22nd, 1913.

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under provisions of Act of Congress approved June 27, 1906 (34 Stats. 517), pursuant to the application of Robert S. Gamble, Serial No. 018,212, we will offer at public sale to the highest bidder, but at not less than $2.50 per acre, at 10 o'clock a. m., on the 19th day of September, 1913, at this office, the following tract of land: S. W. ¼ S. W. ¼ Sec. 33, Township 9 N., Range 59 W. 6th Principal Meridian.

Any persons claiming adversely the above-described land are advised to file their claims, or objections, on or before the time designated for sale.

W. H. POUND, *Register.* 20
CHAS. B. TIMBERLAKE, *Receiver.*

Notice for Publication—Isolated Tract.

Serial 018,213.

Public Land Sale.

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE AT STERLING,
COLORADO, July 22nd, 1913.

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under provisions of Act of Congress approved June 27, 1906, (34 Stats. 517), pursuant to the application of Thomas Gamble, Serial No. 018,213, we will offer at public sale, to the highest bidder, but at not less than $2.50 per acre, at 10 o'clock a. m., on the 19th day of September, 1913, at this office the following tract of land; Lots 2, 3 and 4, S. W. ¼ N. E. ¼ Sec. 5, Township 8 N., R. 59 W., 6th Principal M.

Any persons claiming adversely the above-described land are advised to file their claims, or objections, on or before the time designated for sale.

W. H. POUND, *Register.* 20
CHAS. B. TIMBERLAKE, *Receiver.*

200 Notice for Publication—Isolated Tract.

Public Land Sale.

DEPARTMENT OF THE INTERIOR,
U. S. LAND OFFICE AT STERLING,
COLORADO, July 22nd, 1913.

Notice is hereby given that, as directed by the Commissioner of the General Land Office, under provisions of Act of Congress approved June 27, 1906 (34 Stats. 517), pursuant to the application of Joe L. Filer, Serial No. 018,341, we will offer at public sale, to the highest bidder, but at not less than $2.00 per acre, at 10 o'clock, a. m., on the 19th day of September, 1913, at this office, the following tract of land: S. ½ S. W. ¼ Sec. 9, Township 8 N., Range 59 W., 6th Principal Meridian.

Any persons claiming adversely the above-described land are advised to file their claims, or objections, on or before the time designated for sale.

W. H. POUND, *Register.* 20
CHAS. B. TIMBERLAKE, *Receiver.*

* * * * * * *

Endorsed: Filed in the District Court on Sept. 16, 1913.

(*Order of Argument on Application for Temporary Injunction, Sept.* 16, 1913.)

This cause comes on now to be further heard upon the application for a temporary injunction, Clayton C. Dorsey, Esquire, appearing as solicitor for the plaintiff and Charles F. Tew, Esquire, appearing as solicitor for the defendants, and is argued by counsel to the hour of adjournment.

(*Order Denying Application for Temporary Injunction.*)

Eighty-Eighth Day, May Term, Thursday, October 30th, A. D. 1913.

Present: The Honorable Robert E. Lewis, District Judge, and other officers as noted on the twenty-second day of July, A. D. 1913.

6158. In Equity.

UNION PACIFIC COMPANY
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, State of Colorado; W. R. Patterson, as County Treasurer of said County, and S. J. McAfee, as Sheriff of said County.

201 Bill for Injunction and for Other Relief.

This cause came on to be heard at this term upon the application of the plaintiff for an injunction, and was argued by counsel, Clayton

C. Dorsey, Esquire, appearing as solicitor for the plaintiff and Charles F. Tew, Esquire, appearing as solicitor for the defendants.

And thereupon, on consideration thereof, it is ordered by the court that said motion be, and the same is hereby, denied.

(*Stipulation as to Use of U. S. Census Report for* 1910 *upon Application for Temporary Injunction, etc.*)

It is hereby stipulated, by and between the parties hereto, by their respective solicitors, that at the hearing upon application for temporary injunction in this cause, as well as at any hearing in any appellate court to which an appeal may be prosecuted in respect of any order entered upon said application, the "Supplement for Colorado—Population, Agriculture, Manufactures, Mines and Quarries," as the same appears at pages 565 to 690 of the volume issued by the Department of Commerce and Labor, Bureau of the Census and printed at the Government Printing Office, Washington, D. C., which volume is entitled, "Thirteenth Census of the United States, Taken in the year 1910. Abstract of the Census, Statistics of Population, Agriculture, Manufactures, and Mining for the United States, the states, and principal cities, with Supplement for Colorado, containing Statistics for the state, counties, cities, and other divisions," may be considered as though the said Supplement for Colorado had in its entirety been offered in evidence of said hearing upon said application for preliminary injunction, and extracts therefrom may be read as part of the evidence by either party, either in said district court or in any such appellate court. No objection is or shall be made thereto on the ground that the printed volume is offered instead of a certified copy of said supplement from the records of the Bureau of the Census, duly certified by the proper public official, but the same or any portion thereof, when read by either party, shall be subject to the objection that it is, for any other reason, incompetent, irrelevant or immaterial.

CLAYTON C. DORSEY,
E. I. THAYER,
Solicitors for Plaintiff.

GERALD HUGHES,
Of Counsel.

W. E. BLISS,
CHARLES F. TEW,
Solicitors for Defendants.

Endorsed: Filed in the District Court on Oct. 30, 1913.

202 *Assignment of Errors on Appeal from Order Refusing Preliminary Injunction.*

Now comes the plaintiff in the above entitled cause, and says: That in the records and proceedings of said district court in the

above entitled cause, and in the order made and entered therein on the 30th day of October, A. D. 1913, there is manifest error, prejudicial to the plaintiff, in the following particulars, to-wit:

1. The court erred in denying plaintiff's application for a preliminary or temporary injunction directed to the defendants, as prayed in the plaintiff's bill.

2. The court erred in refusing to grant the preliminary or temporary injunction against the defendants as prayed in plaintiff's bill, which preliminary or temporary injunction was sought and applied for by plaintiff.

3. The court erred in holding that, upon the showing made, plaintiff had a plain, speedy and adequate, or any remedy whatsoever, at law.

4. The court erred in holding that the showing made in support of said application for preliminary or temporary injunction was not sufficient to require, authorize or justify the issuance of the preliminary or temporary injunction sought, or any preliminary relief whatsoever.

Wherefore, plaintiff prays:

That said order be reversed and said refusal revoked, with directions to issue the injunction sought by the plaintiff.

N. H. LOOMIS,
CLAYTON C. DORSEY,
E. I. THAYER,
Solicitors for Plaintiff.

GERALD HUGHES,
Of Counsel.

Endorsed: Filed in the District Court on Nov. 10, 1913.

Petition for Appeal from Order Denying Preliminary or Temporary Injunction.

The above plaintiff, conceiving itself aggrieved by the order made and entered on the 30th day of October, A. D. 1913, in the above entitled cause, denying plaintiff's application for a preliminary or temporary injunction herein against the said defendants,
203 as prayed in its bill of complaint, and refusing to issue such injunction, does hereby appeal from said order and said refusal to the United States circuit court of appeals for the eighth circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal may be allowed, and prays that a transcript of the record, proceedings and papers upon which said order was made and said refusal predicated, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

N. H. LOOMIS,
CLAYTON C. DORSEY,
E. I. THAYER,
Solicitors for Plaintiff.

GERALD HUGHES,
Of Counsel.

The foregoing claim of appeal is hereby allowed.

Dated at Denver, Colorado, this 10th day of November, A. D. 1913.

ROBT. E. LEWIS,
District Judge.

Endorsed: Filed in the District Court on Nov. 10, 1913.

(Order Allowing Appeal, etc., Nov. 10, 1913.)

Before Judge Lewis.

In this cause, on motion of solicitors for plaintiff, and upon consideration of the assignment of error and petition for said appeal,

It is ordered that an appeal from the order heretofore and on October 30th, A. D. 1913, entered herein refusing the preliminary or temporary injunction sought and applied for by plaintiff against the defendants, as prayed in its bill of complaint, be, and the same is hereby allowed.

And it is further ordered, that the bond on said appeal be and the same is hereby fixed at the sum of five hundred dollars ($500.00).

Bond on Appeal from Order Refusing Injunction.

UNITED STATES OF AMERICA,
District of Colorado, ss:

Know all men by these presents, that we, Union Pacific Railroad Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto The Board
204 of County Commissioners of the County of Weld, State of Colorado, W. R. Patterson, as County Treasurer of said County, and S. J. McAfee, as Sheriff of said county, in the full and just sum of five hundred dollars ($500.00), to be paid to the said The Board of County Commissioners of the County of Weld, state of Colorado, W. R. Patterson, as County Treasurer of said county, and S. J. McAfee, as sheriff of said county, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors or assigns jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of November, in the year of our Lord one thousand, nine hundred and thirteen.

Whereas, lately, at the May, 1913, term of the United States district court for the district of Colorado, in a suit depending in said court between Union Pacific Railroad Company, a corporation, plaintiff, and The Board of County Commissioners of the County of Weld, State of Colorado, W. R. Patterson, as County Treasurer of said county, and S. J. McAfee, as Sheriff of said county, defendants, an interlocutory decree or order was rendered and entered against the

said plaintiff, denying its application for a preliminary or temporary injunction and refusing to issue the said injunction, and the said Union Pacific Railroad Company, plaintiff, has obtained an appeal from said district court to the United States circuit court of appeals for the eighth circuit to reverse the said interlocutory decree or order in the aforesaid suit, and a citation directed to the said defendants above named, citing and admonishing them to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty (60) days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Union Railroad Company shall prosecute said appeal to effect, and answer all costs if it shall fail to sustain its appeal, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] UNION PACIFIC RAILROAD COMPANY,
By C. C. DORSEY, *Gen. Att'y,*
Principal.

[SEAL.] NATIONAL SURETY CO.,
[SEAL.] By RALPH W. SMITH,
Attorney in Fact.
Sureties.

[Corporate Seal National Surety Company.]

205 Approved, this 10th day of November, A. D. 1913.
ROBT. E. LEWIS,
District Judge.

Endorsed: Filed in the District Court on Nov. 10, 1913.

Petition for Restraining Order Pending Appeal from Order Refusing Injunction.

Now comes the plaintiff above named, and respectfully petitions the court that, in accordance with the letter and spirit of Equity Rule 74, and pursuant to the practice of federal courts of equity in that behalf, and in order that the status quo may be maintained during the pendency of the appeal this day allowed from the order denying the preliminary injunction applied for herein, a restraining order be entered herein, upon such terms as to bond or otherwise, as the court may consider proper for the security of the rights of the defendants, commanding and enjoining said defendants and each of them, their deputies, clerks, agents, attorneys, servants, representatives and employees, and all and singular the persons acting for or under them or any of them, absolutely and wholly to desist and refrain from in any manner collecting or attempting to collect any tax or assessment against said Union Pacific Railroad Company or any of its property, levied or assessed or pretended or claimed to have been levied or assessed, for the year 1912, in, for or by said county of Weld, or collectible [throught] its agency, and

from in any manner seizing, distraining or selling, or attempting to seize, distrain or sell, or in any manner interfere with, any property of said Union Pacific Railroad Company, for or on account of any taxes claimed or pretended to be due or payable to, or collectible by, the said county of Weld or any of its officers or agencies, for the said year 1912, said restraining order to remain in force during the pendency of said appeal hereinabove mentioned, or until modified or dissolved by the court to which said appeal has been taken, or by this court.

And in support of said petition your petitioner, Union Pacific Railroad Company, respectfully shows: That as appears from its supplemental bill of complaint herein filed, it has, since the commencement of this action, paid to the county treasurer of said Weld county the amount heretofore tendered by it, to-wit, forty-six thousand, six hundred ninety-one dollars and four cents ($46,691.04), leaving a balance of the total amount claimed by the defendants to be properly collectible, in the sum of thirty-one thousand,
206 one hundred twenty-seven dollars and thirty-seven cents, which is still unpaid; that, as appears from the pleadings herein, and from the showing made, the defendants claim and assert the right, and insist that it is their official duty, to collect said balance, by distraint or otherwise, as the laws of the state of Colorado direct; that, unless said restraining order be entered, the status quo will during the pendence of said appeal be so altered as to render any relief which Union Pacific Railroad Company might obtain upon said appeal entirely ineffectual and said appeal nugatory.

N. H. LOOMIS,
CLAYTON C. DORSEY,
E. I. THAYER,
Solicitors for Petitioner, Union Pacific Railroad Company.

GERALD HUGHES,
Of Counsel.

Endorsed: Filed in the District Court on Nov. 10, 1913.

(*Order, Nov.* 10, 1913, *Granting Petition for Restraining Order Pending Appeal and Fixing Amount of Bond.*)

On consideration of plaintiff's petition for a restraining order pending the determination of the appeal from the order heretofore entered herein denying a preliminary injunction, and upon further consideration of the bill of plaintiff, the supplemental bill and the answer herein, and the situation of the parties as disclosed thereby and by the showing made in connection with the application for the preliminary injunction, and solely to maintain the status quo, pending the determination of said appeal,

It is hereby ordered, that a restraining order be entered herein, restraining the defendants, during the pendency of said appeal, as prayed in said petition, said order to remain in effect during the

pendency of said appeal or until modified or dissolved, either by said circuit court of appeals, to which said appeal is [take-], or by this court;

Upon condition, however, that the said plaintiff and petitioner forthwith file herein a bond in the penal sum of fifty thousand dollars ($50,000.00), with surety to be approved by the clerk of this court, conditioned that the said Union Pacific Railroad Company will answer and pay all costs and damages occasioned thereby, in case said restraining order be subsequently modified or dissolved, and will also well and truly pay or cause to be paid any and all sums of money which may by the final decision, Judgment
207 and decree in this cause, as finally adjudicated, be determined and adjudged to be due to or collectible by said county of Weld or its officers from said Union Pacific Railroad Company on account of taxes for the year 1912, and interest and penalties accrued thereon to the date of payment.

Bond on Restraining Order Pending Appeal.

UNITED STATES OF AMERICA,
District of Colorado, ss:

In the District Court of the United States for the District of Colorado.

Know all men by these presents, that Union Pacific Railroad Company, a corporation organized and existing under the laws of the state of Utah, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto The Board of County Commissioners of the county of Weld, state of Colorado, W. R. Patterson, as County Treasurer of said county, and S. J. McAfee, as Sheriff of said county, in the full and just sum of fifty thousand dollars ($50,000.00) to be paid to the said The Board of County Commissioners of the county of Weld, state of Colorado, W. R. Patterson, as County Treasurer of said county, and S. J. McAfee, as Sheriff of said county, their successors or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this tenth day of November, A. D. 1913.

Whereas, the above bounden Union Pacific Railroad Company has filed its bill of complaint in the district court of the United States for the district of Colorado, on the chancery side thereof, against the above named The Board of County Commissioners of the county of Weld, state of Colorado, W. R. Patterson, as County Treasurer of said county, and S. J. McAfee, as Sheriff of said county, praying, among other things, for an injunction to restrain said defendants from collecting or attempting to collect a certain tax; and,

Whereas, the preliminary injunction sought by plaintiff in said

suit has been denied by the court, from which denial said plaintiff has taken an appeal to the circuit court of appeals of the United States for the eighth circuit, which appeal has been allowed, and has petitioned for a restraining order to maintain the status quo pending said appeal, which petition has been granted and said
208 restraining order allowed, upon the said Union Pacific Railroad Company giving bond and security as provided by law, and as required by the order of said district court granting said restraining order:

Now, therefore, the condition of the above obligation is such, that if the above bounded Union Pacific Railroad Company, and National Surety Company of New York, their executors, administrators, successors or assigns, or any of them, shall and do well and truly pay, or cause to be paid to the said The Board of County Commissioners of the county of Weld, state of Colorado, W. R. Patterson, as county treasurer of said county, and S. J. McAfee, as sheriff of said county, their successors or assigns, all such costs and damages as the said defendants shall suffer or sustain by reason of said restraining order in case the said restraining order shall be modified or dissolved in whole or in part, and shall and do also well and truly pay or cause to be paid to said parties, their successors or assigns, any and all sums of money which may by the final decision, judgment and decree in this cause, as finally adjudicated, be determined and adjudged to be due or collectible by said county of Weld or its officers from said Union Pacific Railroad Company on account of taxes for the year 1912, and interest and penalties accrued thereon to the date of payment, then the above obligation to be void, otherwise to be and remain in full force and virtue.

UNION PACIFIC RAILROAD COMPANY,
By CLAYTON C. DORSEY, *Gen. Att'y,*
Principal.

NATIONAL SURETY CO.,
By RALPH W. SMITH, *Att'y in Fact, Surety.*

[Corporate Seal National Surety Company.]

Approved November 10, 1913.
CHARLES W. BISHOP, *Clerk.*

(*Restraining Order Pending Appeal, Nov.* 10, 1913.)

Before Judge Lewis.

Whereas, in the above entitled cause an appeal has been prayed and allowed to the circuit court of appeals from the order recently entered herein denying the plaintiff's application for a pre-
209 liminary or temporary injunction; and whereas, the plaintiff herein, appellant in said appeal, has filed its petition for a restraining order to maintain the status quo during the pendency of said appeal and in aid thereof, therefore, upon consideration of

said petition, and being fully advised in the premises, said application for such restraining order is hereby granted.

Now, therefore, take notice, that you, the Board of County Commissioners of the County of Weld, state of Colorado, W. R. Patterson as County Treasurer of said County, and S. J. McAfee as Sheriff of said County, and each of you, your deputies, clerks, agents, attorneys, servants, representatives and employees, and each of them, and all and singular the persons acting for or under you or either of you, are hereby ordered and directed absolutely and wholly to desist and refrain from in any manner collecting or attempting to collect any taxes or assessments against said Union Pacific Railroad Company or any of its property, levied or assessed or pretended or claimed to have been levied or assessed, for the year 1912, in, for or by said county of Weld or collectible through its agency or that of any of its officers, and from in any manner seizing, distraining or selling, or attempting to seize, distrain, or sell or in any manner interfere with any property of said Union Pacific Railroad Company, for or on account of any taxes claimed to be due or payable to or collectible by the said County of Weld or any of its officers or agencies, for the said year 1912, said restraining order to remain in force during the pendency of said appeal hereinabove mentioned, or until modified or dissolved by the court to which said appeal has been taken or by this court.

(Certified Copy of Restraining Order with Acknowledgment of Service.)

Whereas, in the above entitled cause an appeal has been prayed and allowed to the circuit court of appeals from the order recently entered herein denying the plaintiff's application for a preliminary or temporary injunction; and whereas, the plaintiff herein, appellant in said appeal, has filed its petition for a restraining order to maintain the status quo during the pendency of said appeal and in aid thereof; therefore, upon consideration of said petition, and being fully advised in the premises, said application for such restraining order is hereby granted.

210 Now therefore, take notice, that you, the Board of County Commissioners of the County of Weld, State of Colorado, W. R. Patterson as County Treasurer of said County, and S. J. McAfee as Sheriff of said County, and each of you, your deputies, clerks, agents, attorneys, servants, representatives and employes, and each of them, and all and singular the persons acting for or under you or either of you, are hereby ordered and directed absolutely and wholly to desist and refrain from in any manner collecting or attempting to collect any taxes or assessments against said Union Pacific Railroad Company or any of its property, levied or assessed or pretended or claimed to have been levied or assessed, for the year 1912, in, for or by said County of Weld or collectible through its agency or that of any of its officers, and from in any manner seizing, distraining or selling or attempting to seize, distrain or sell or in any

manner interfere with any property of said Union Pacific Railroad Company, for or on account of any taxes claimed to be due or payable to or collectible by the said County of Weld or any of its officers or agencies, for the said year 1912, said restraining order to remain in force during the pendency of said appeal hereinabove mentioned, or until modified or dissolved by the court to which said appeal has been taken or by this court.

Dated this 10th day of November, A. D. 1913.

ROBERT E. LEWIS,
Judge of the District Court of the United States for the District of Colorado.

Endorsed: Court No. 6158. Div. —. In the U. S. district court for the district of Colorado. Union Pacific Railroad Company, plaintiff, vs. The Board of County Commissioners of the County of Weld, state of Colorado, et al., defendant. Restraining Order pending Appeal. Filed Nov. 10, 1913, Charles W. Bishop, Clerk. Hughes & Dorsey, attorneys for —— ——. No. —.

A true copy,
Teste:

CHARLES W. BISHOP, *Clerk.*
——— ———, *Deputy Clerk.*

[Seal U. S. District Court.]

211 The defendants above named, and each of them, hereby acknowledge service of the foregoing restraining order, by the receipt of a copy thereof, at Greeley, Colorado, this 11th day of November, A. D. 1913.

CHARLES F. TEW,
WALTER E. BLISS,
Solicitors for All of said Defendants.

Endorsed: Certified Copy of Restraining Order and Proof of Service Thereon. Filed Nov. 13, 1913. Charles W. Bishop, Clerk.

(Notice of Lodgment of Narrative Statement of Evidence, etc.)

To the defendants above named and to their solicitors:

You and each of you are hereby notified that on this 6th day of December, A. D. 1913, we have, in compliance with paragraph (*a*) of Equity Rule No. 75, filed with the Clerk of the court a præcipe indicating the portions of the record to be incorporated into the transcript on appeal to the Circuit Court of Appeals, from the order denying the application for preliminary injunction, a copy of which præcipe is herewith served upon you.

You and each of you are further notified that in compliance with paragraph (*b*) of said Equity Rule No. 75, we have this day lodged in the Clerk's office for your examination a statement, prepared in

accordance with said paragraph of said rule, of the evidence produced by either party at the hearing upon said application for preliminary injunction, other than that which was produced in the form of written affidavits, which are already in narrative form.

You and each of you are further notified that we will on Thursday, the 18th day of December, A. D. 1913, at the United States Court Room, at Denver, Colo., at the hour of 10 o'clock a. m., apply to the court or Judge thereof to approve said statement.

N. H. LOOMIS,
CLAYTON C. DORSEY,
E. I. THAYER,
Solicitors for Plaintiff and Appellant.

GERALD HUGHES,
Of Counsel.

212 Received a copy of the foregoing notice, together with a copy of the præcipe therein referred to this 8th day of December, at 9:30 a. m., A. D. 1913.

CHARLES F. TEW,
WALTER E. BLISS,
Solicitors for Defendants.

Endorsed: Filed in the District Court on Dec. 9, 1913.

(*Narrative Statement of Evidence.*)

C. S. STEBBINS, witness on behalf of complainant, testified as follows:

Direct examination.

By Mr. Dorsey:

Name is C. S. Stebbins; reside in Omaha, Nebraska; Assistant to Auditor of Union Pacific Railroad Company; have been connected with auditing department of Union Pacific for nineteen years.

Presumably the auditing department of Union Pacific furnished to the Tax Commissioner of Union Pacific the information to be inserted by the Tax Commissioner in his report to the State Tax Commission or the State Board of Equalization of Colorado respecting the earnings of the Union Pacific Company in the State of Colorado, from both intrastate and interstate business, and also respecting the expenses of the Union Pacific Company from the operation of its railroad business. That information would include all the earnings [*all the earnings*] of the Union Pacific Company both within and without the State of Colorado, and also earnings of the Union Pacific Company within the State of Colorado from both intrastate and interstate business. It would include the proportion of the entire operating expenses of Union Pacific Company assigned to the State of Colorado.

The basis or formula which we adopted in giving that informa-

tion was a formula prescribed by the Tax Commission of Colorado. I assume that the information that was given to the Union Pacific Tax Commissioner was a copy of the transcript of the report which was made to the Railway Commission of Colorado. That formula related to the assignment to Colorado of its due proportion of the earnings from interstate business, both freight and passenger and that proportion was ascertained by this formula which I describe.

The formula was adopted by the twentieth annual convention of the National Association of State Railway Commissioners,
213 and it has been prescribed for the use of the Union Pacific by the State Commissioners of Iowa, Nebraska, Kansas and Colorado. That relates to the proportional earnings and expenses of interstate business. The apportionment of expenses is included in the same formula.

The total earnings of the Union Pacific Company in the State of Colorado was a matter of record. Total earnings of the Union Pacific Company as a whole are a matter of record. The earnings from transportation wholly within the State of Colorado are assigned to the State of Colorado. The earnings of the Company on interstate business which is carried partly in the State of Colorado and partly in other states is assigned to the separate states, assigned to Colorado on the basis prescribed by the Railway Commission of Colorado. That presumably was the method adopted for ascertaining the results furnished by the auditing department to Mr. Scribner, Tax Commissioner of the Union Pacific, for use in his report. If we did furnish Mr. Scribner any figures on this account, it was simply a transcript of our report to the State Commission of Colorado; arrived at by the methods prescribed by the Colorado Commission. I may state that in respect to the transportation of mail and express it was impracticable to apply exactly the formula prescribed by the Commission, for the reason that we did not have the information as to points between which mail and express were carried, so that for the apportionment of mail and express revenue we used a basis that was as nearly in harmony with the basis prescribed by the Commission as it was practicable to use. The formula or basis or rule as prescribed by the various state railroad commissions, including the State Railroad Commission of Colorado, and approved and recognized by the National Association of State Railroad Commissioners, is: First, the apportionment of transportation revenues to each state shall be upon the following basis: each state shall be credited with all revenue derived from its intrastate business; [transpo-tation] revenues from interstate business shall be credited to each state through which interstate business — in proportion to the distance traversed; second the earnings and incomes from other sources than transportation of such railway company shall be credited to each state on a road [mil-age] basis; third, the total operating expenses shall be charged to each state on the basis of train [mil-age] in each state.

In ascertaining Colorado's proportion of earnings upon an interstate shipment of freight, we take up each individual shipment and determine the [mil-age] of that shipment and apportion the earn-

ings accordingly. That is the way the rule is applied. The
214 same method is applied as to each passenger who may move from one state to another on a train on the Union Pacific. Then we arrive at the results which we state in our report and which were furnished to Mr. Scribner.

Cross-examination.

By Mr. Tew:

I don't know when the information was given to the Tax Commissioner; the report to the State Railway Commission for each year ending June 30th is furnished to the Commission about the first of October succeeding. About the first of October of each year we furnish to the State Railway Commission a report concerning the earnings and expenses for the preceding fiscal year ending June 30th. The report furnished Mr. Scribner is the same report that our Auditing Department made to the State Railway Commission. That was filed there about the first of October. That refers to a year beginning on July first of one year and ending on June 30th of the next year,—that [*in*] on June 30th preceding the October in which the report is filed.

I am not the head of the Auditing Department; I am assistant to the Auditor.

The basis of figures of expenses of operating the railroad for the year upon which this estimate of earnings is made includes all expenses which are classified as expenses by the Interstate Commerce Commission.

The expenses of land sales are not included in the expenses of operation of the railroad. Yes, the railroad has some land still in its control that it sells and handles. The land expenses are practically all handled by a separate set of officers and employees. There is possibly a small charge to land expenses for the expenses of the accounting department. I am not familiar with the present practice in that respect. Yes, I know what methods of bookkeeping are employed by the auditor of the road to make these calculations. The accounts of the land department are kept by a separate set of clerks in the accounting department. Whether there is any apportionment of the expense of the auditor charged to the land department for supervision of these clerks I cannot say positively. A few years ago there was a charge of that kind which amounted to twenty-five or fifty dollars a month, but there is no charge made for any proportion of the salaries or expenses of other officers, such as president or comptroller or the general manager. I would say that the expenses of the land department are absolutely segregated from the expenses of the railroad company to an extent certainly not exceeding one hundred dollars per month. That
215 is, all expenses concerning the handling of U. P. lands are kept out of our calculations in regard to expenses. Any expenses that the road may have been to in the handling of its lands and for some executive officers, clerks or employees, than [*in*] would otherwise have, has been excluded from our calculations of expense.

There have been no expenses excluded from the basis of calculating the earnings in regard to which we made a report to the Tax Commissioner, which were properly chargeable to the operation of the road under the classification prescribed by the Interstate Commerce Commission. There were no expenses of the road excluded from the expense column which, in the judgment of the officers of the road should have been there inserted in accordance with the classification of expense prescribed by the Interstate Commerce Commission. In making up this report concerning the earnings, the outlays and expenditures and incomes the making up of the statement and conclusions therefrom included such items of expense and such items of income as in the judgment of the auditor and officers of the road should be rightfully so placed.

The [exoenses] of the general offices [*on*] New York, which supervises the business of Union Pacific Railroad Company including its auxiliary companies, Oregon Short Line and Oregon Washington Railroad and Navigation Company, were necessarily apportioned between the Union Pacific, the Oregon Short Line and the Oregon Washington Railroad and Navigation Company. These apportionments were segregated and separated by the comptroller in New York, as in his judgment was proper to obtain the rightful conclusion as to earnings.

I cannot give the date when we got this report of the auditor to the Tax Commissioner. I have no memorandum as to an actual report from the auditing department transmitted to the Tax Commissioner at any time; however, I have the figures here. I have no knowledge as to whether Mr. Scribner obtained those figures from the auditing department in Omaha or whether they were otherwise transmitted to him. I have no knowledge of the methods of the deduction or conclusion employed by Mr. Scribner in making the statement which he made to the State Tax Commission, which is called the schedule.

I do not personally know of any report in which there is stated the number of miles of main track of railroad made by the railroad to Mr. Scribner. I have no personal knowledge of the number of miles of main track which was operated on which this earned report was made for the year 1911 for taxing purposes in Colorado
216 for 1912. I do not know what the auditing department told Mr. Scribner the number of miles of main track on the Union Pacific system was. I do not know what Mr. Scribner stated in his tax statement. I can give what the auditing department figured on in making its conclusion by referring to my table of figures. The figures 6678.29 are approximately correct, within a few hundred miles at any rate including the [mil-age] of the Union Pacific, the Oregon Short Line Railroad Company and the O. R. N. Company; exclusive of the Oregon Washington and the Short Line, about thirty-five hundred. The auditing department of the Union Pacific does not include a total [mil-age] of approximately 6678.29. The outlays reported by the auditor of the Union Pacific to the Tax Commissioner would include only the operating expenses of the Union Pacific Railroad, thirty-five hundred miles of road approxi-

mately. The earnings and expenses of Union Pacific Railroad Company, Oregon Short Line Railroad Company and Oregon-Washington Railroad and Navigation Company are kept separate, just as they would be if the roads were not in common ownership, with the exception of a few joint officers and employees of all the lines.

In making this calculation, the chief engineer determined the number of active or operated miles of main track to be used as the basis of calculation per mile of expenses and income. There is no way for the Auditor to know whether he overstated or understated the number of miles in operation. The chief engineer determines the number of miles in each state and as a whole.

The income per mile of road is the total income divided by the number of miles of road. The income per mile of road is dependent upon the total income and the total [mil-age] of the road. If either the road [mil-age] or the amount of revenue is incorrect the earnings per mile of road will necessarily be incorrect.

Q. If I would recall to you the figures would you know whether or not they approximately stated the net earnings as you reported your department report of the railroad proper to Mr. Scribner from which he reported to the Tax Commission?

A. I have the figures here with me of the earnings and expenses reported to the State of Colorado for the year ending June 30, 1912.

217 I couldn't answer as to whether the net earnings reported to Mr. Scribner of the Union Pacific Railroad proper for this particular year were $21,766,917.18; or was approximately per mile $6,237.37. I cannot say whether it was in the neighborhood of six thousand dollars per mile counting the [mil-age] of the whole system.

I do not know what Mr. Scribner reported to the Tax Commission. It would be impossible for the accounting department to make any check upon the engineering department in regard to reporting the right number of active miles of main track. I cannot answer as to whether the calculation of earnings and expenses is given by the mile in the conclusion given to Mr. Scribner.

The estimation per mile is made on a [mil-age] basis of miles of road, not miles of main track. Miles of road is the length of the road regardless of whether it is occupied by one track or two tracks. Road [mil-age], as the term is generally used, counts double track the same as single track and omits side-track [mil-age]. The earnings and expenses per mile would be stated ordinarily on the basis of the road mileage.

The earnings and expenses in gross assigned to the State of Colorado are determined upon the basis prescribed by the Railway Commission of Colorado. To determine the earnings per mile, the expenses per mile and the net earnings per mile, the gross amounts would be divided by the [mil-age] of the road in Colorado.

Entire operating expenses of the road are apportioned to Colorado and other states on the basis of the train mileage in each state. The earnings from interstate traffic which is carried partly in Colorado and partly in another state is assigned to Colorado and

other states on the basis of the mileage traversed in each state by each particular shipment and each particular passenger. It is necessary to determine the expense of the whole road to determine the expense in Colorado. It is not necessary to determine the earnings of the whole road to determine the earnings in Colorado. It is not necessary to determine [*to determine*] the earnings in Colorado, to take any account of the intrastate traffic of other states.

The Union Pacific Railroad, thirty-five hundred miles is operated as a unit; the Oregon Short Line is operated as another unit, the Oregon-Washington Railroad and Navigation Company is operated as another unit. The three lines comprise what is termed the Union Pacific System, but each line keeps its accounts and makes a separate report to the Interstate Commerce Commission.

218 It is under the management of the president of the Union Pacific, and the Oregon Short Line is the same. The Oregon-Washington Railroad and Navigation Company has another president. The three companies have the same comptroller. The chairman of the board of directors is the same man in each case, though the directors are not identical for the three companies.

The whole system is not operated together for the carriage of freight and passengers. We do not advertise the whole system together in the sense of being operated as a system. When you come down to the Union Pacific proper, it is true that we operate the lines in the state of Colorado as a part of the same line, that runs through Kansas, and other branch lines down through Nebraska to Omaha, and another branch line northward to Cheyenne and into Wyoming and through the same. We have locomotives that travel over these tracks partly in Colorado and partly outside of it. Some of the cars that leave Denver, passenger and freight, are operated in Colorado alone, and some carry freight and passengers out and beyond it. Repairs are done at Cheyenne on engines that ply between Denver and Cheyenne, and some are done at Denver, the same as repairs on passenger and freight cars that travel in Colorado. The whole management of this line of railroad does not cease at the north line of the state, but runs into Wyoming; the same is true of the east line of the state.

The apportionment of the earnings and expenses to states is theoretical; it is not an actual expenditure of a certain amount in each state. The earnings and expenses of Union Pacific Railroad Company are an exact quantity in each case. There are some items of expenditure concerning which it is a matter of judgment whether they should be charged as operating expenses of the road or simply a deduction from income after the net revenue has been ascertained.

It is true that net earnings per mile on the Union Pacific system can be determined more accurately on the whole system than on the Colorado mileage as segregated. That is true because we have the total operating expenses and the total income before us, and because it is impossible except in theory to separate the income and outlay concerning any particular portion of the road less than the whole, as to a considerable portion. Given the actual income of the road as a whole and the expenses of the road as a whole and a

correct statement of the number of miles of main track actually operated, we could obtain by calculation with approximate certainty the net earnings per mile of the road as a whole. We could not take the number of miles in any particular state and estimate the
219 net earnings per mile with the same degree of accuracy as we could the net earnings per mile of the whole road for the reason that the apportionment of earnings and expenses to the state is theoretical and not actual.

If there are in the statement made to Mr. Scribner statement of net income per mile of Union Pacific mileage in Colorado, and statements of net earnings of Union Pacific per mile of the whole system, I would say that the latter is a better basis for accuracy than the former.

The report submitted to Mr. Scribner is presumably a report for the year ending June 30th, 1911 or 1912. Our accounts are kept by the fiscal years under compulsion of the Interstate Commerce Commission. As far as earnings and expenses are concerned, those are kept by the month and a report can be made for the calendar year as well as for the fiscal year. The earnings and expenses are kept by the month, and we would give the Tax Commissioner the earnings and expenses for any period he asks for.

I have no personal knowledge of the report that has been given to Mr. Scribner. I do not know that he made his basis of statements from this report at all. We make the reports to the Railway Commission of Colorado for each fiscal year, the twelve months ending June 30th of each year. If Mr. Scribner used one of these reports as the basis for his report, it would not be a report from which he could determine the earnings of the road per mile in Colorado or elsewhere, for the calendar year 1911.

Under the formula prescribed by the state Railroad Commission, the basis of apportionment is theoretical; the apportionment upon those bases are accurate. The calculations are accurate, but the method is theoretical.

If the Tax Commissioner asked for statements as to the total number of shares of *common* and common stock of the railroad outstanding we would give him that information. We would have to obtain it from the comptroller's office in New York. I would make the same explanation as to furnishing that as I do as to furnishing him the other data that I describe with the further explanation that that is not a matter of record in the accounting department in Omaha; it is a matter of record in the Secretary's office in New York. The same is true as to total number of the three classes of bonds of the railroad which are outstanding. The auditing department does not have the amount of each. We have no statistics in that department from which I can state what is the average value in the market of any of these securities of the
220 road, or value of shares of stock described. We have no information upon record in the accounting department upon these matters. We do not keep in the auditing department records there of what are called auxiliary stocks owned by any auxiliary railroad company, or records as to the investments of any stock of

the road. We have no records of those amounts, with possibly the exception of a land company or a water company, but I think not. We have no records in the accounting department from which we could give to Mr. Scribner, or could get the amount of cash and demand loans and time deposits in the sum of approximately sixty-seven million dollars owned by the railroad, or any amount. Those matters of advances for the construction of new lines might in some cases pass through the accounting department at Omaha, and in other cases they would not. I think in any case the accounting department at Omaha would not have a complete record.

Redirect examination.

By Mr. Dorsey:

In respect to the ascertainment of operating expenses of railroads, the Interstate Commerce Commission has prescribed certain definite rules as to the kinds of accounts and what items are to be included in the operating expenses.

In furnishing this statement of expenses to the State Railroad Commission of Colorado, and like expenses which we include in our annual report, for example, Union Pacific operations, by expense I mean expenses from operation, chargeable to operation in accordance with those rules of the Interstate Commerce Commission. I do not charge to operation expenses of the land department or of the other departments of the railroad company that are not connected with operation. Those are separate matters and are not included in that computation or deducted on that account.

The Union Pacific Company prepares and puts out an annual report in printed form. That report is issued as soon as it can be prepared after June 30th of each year, which is the end of the fiscal year. It is issued under the authority of the Board of Directors. The figures that go into it are furnished directly by the comptroller. The figures for Union Pacific Company so far as they relate to revenues and operation and operating expenses are furnished by the accounting department at Omaha. Everything that is contained in the annual report of the Union Pacific Company is issued with the approval of the comptroller, who is comptroller for the Union Pacific, the Oregon Short Line and the O. R. & N., and the statements made therein are made by the authority of the comptroller and are official. The reports of the Union Pacific, and especially
221 the report for the fiscal year ending June 30, 1911, are in the form of a printed pamphlet, copy of which you now show me. Any statements made therein in respect to any of the matters referred to would be accurate. The statements or reports which are made by the Union Pacific company to the state Railroad Commission of Colorado are made for the fiscal year ending June 30th, each year.

With the understanding that the report made by Mr. Scribner for taxation purposes to the State Tax Commission of Colorado covers the calendar year and not the fiscal year, and the matters reported to the State Tax Commission are matters as they existed during the

calendar year ending December 31, 1911, if Mr. Scribner had gone to our department in Omaha and requested from that department information concerning the gross earnings and expenses of the Union Pacific Railroad Company, as an entirety—the company alone, not the system—and the average gross and average net earnings per mile for the calendar year ending December 31, 1911 our department would have been in position to furnish it to him. The earnings and expenses of each month are kept separately. And if those had been furnished him by our department the figures as furnished would have been accurate. If he had also requested at the same time a statement concerning the gross earnings, operating expenses, and the gross average and average net earnings per mile of Union Pacific in Colorado for the same calendar year, our department would have been able to furnish it to him. And in furnishing the proportion of earnings on interstate business and the proportion of operating expenses assignable to Colorado, our department would have used the method which I described a while ago, under the formula prescribed by the various state Railroad Commissions, including that of Colorado, and approved by the National Association of State Railroad Commissioners. Information furnished as to total earnings of intrastate business would have been arrived at without the application of any formula; that is simply the compilation. And as to these lines the information furnished to Mr. Scribner for the calendar year would have been correct.

I am in special charge of the department of statistics which furnishes the reports to the State Railway Commissions and the Interstate Commerce Commission, and also which would furnish Mr. Scribner, or his department, with information upon the subjects in charge of my department, if he applied for it.

222 I did not personally furnish Mr. Scribner or his department with the information, but if he or his department should apply to any of the members of my department for the information he would have received it in some kind of computed form the same as though I had furnished it myself.

In determining the average earnings or average expense per mile of road, according to our method of computation, we compile an average [mil-age] for each month. If the mileage of a thirty-day month should be averaged on say the 16th day of the month, we would take fifteen days at the old mileage and fifteen days at the new mileage and make an average mileage for the entire month; then we would make an average for the year, taking the average mileage for each month. I think that is a correct, recognized and approved method in matters of that sort.

There is a difference between the entire earning of a railroad according to its mileage, and ascertaining the actual earning of any particular part of a railroad. If Union Pacific Railroad Company as an entirety earned a very large amount during a particular year, it would hardly be correct to divide the amount earned by the total mileage and thus find out the average per mile, and then say that each mile of track of some branch line, for example, earned that much. The average would be the average of the road as a whole.

It would not be a reasonable statement to make to say that that average of the road as a whole was the earnings of any particular mile of road. If there was a large business transacted in any particular year, say between Omaha and Grand Island, Nebraska, which added materially to the total earnings and therefore entered into the average per mile, it would not be fair to say that those earnings were attributable to any earnings in Colorado. If it be a fact that a very large part of the earnings of Union Pacific Railroad Company are made by reason of its transcontinental traffic passing over what we call the main line between Ogden and Omaha, and passing through Colorado only to the extent of the seven or eight miles of main track through Julesburg, I think, considering that track by itself, it would not be reasonable to assign any very large [p-oportion] to the State of Colorado. The traffic on the line from Council Bluffs to Ogden is much heavier than practically the entire portion of the road; much heavier than it is on the Colorado line. This method which our department adopts in segregating Colorado earnings and Colorado expenses on interstate business is theoretical, but nevertheless it is the method approved by the National
223 Association of State Railway Commissioners, and for the use of Union Pacific Railroad Company has been prescribed by the State Commissions of Iowa, Nebraska, Kansas and Colorado.

ARTHUR W. SCRIBNER, a witness on behalf of complainant testified as follows:

Direct examination.

By Mr. Dorsey:

My name is Arthur W. Scribner; residence Omaha, Nebraska; Tax Commissioner of Union Pacific Railroad Company. I have been connected with the tax department of Union Pacific Railroad Company and its predecessors since the year 1891; have been connected with the tax department of any railroad company the same length of time. Have been Tax Commissioner since 1891.

The duties of my department in respect to matters of taxation in Colorado are to furnish lists and reports of its property as required by the tax officials of the state, and to look after its assessments in a general way, and further to check up the taxes throughout the various counties and to make vouchers for the payment of such taxes. The department has like duties in respect to the other states through which the Union Pacific runs.

I made such return to the state Board of Equalization for the year ending December 31, 1911. The document which you now hand me, marked Exhibit A, I believe to be a correct copy of that report. This report spoke of conditions as they existed during the calendar year ending December 31, 1911, in accordance with the statute of the state. I obtained the figures therein contained concerning the gross and net earnings and operating expense of the Union Pacific Railroad Company in the state of Colorado and as a whole from the office of the auditor of the Union Pacific Railroad

Company at Omaha, and they are set down in the report exactly as obtained from the auditor. My recollection now is that I filed the very same writing and figures as they were entered in the report in the auditor's office; but I did not recopy them in my office. I asked the auditor's office to furnish me a report as required by the blank form showing the earnings and expenses of Union Pacific Railroad Company, proper, as a whole, and the earnings and expenses of that portion of the Union Pacific within the state of Colorado, for the year ending December 31, 1911. The information as to the earnings and expenses of Union Pacific system is stated in the report as a matter of additional information for the Tax Commission, and the figures were obtained from the published annual report of Union Pacific Railroad Company for the fiscal year ending June 30, 1911, and so stated in the report to the Tax Commission.

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The statement as to mileage of Union Pacific Railroad within the state of Colorado and the mileage of the Union Pacific Railroad proper for the year ending December 31, 1911, I obtained from the Chief Engineer's office. The average mileage used in computing earnings and expenses, which is different from the mileage on any certain day, I secured from the auditor's office as the official figures. After they are received from the chief engineer's office they are kept in the auditor's office for accounting purposes. As to Union Pacific System, for the statement of earnings and expenses, which is an average mileage, it is obtained from the annual report. The mileage on December 31, 1911 was secured from the chief engineer's office of Union Pacific proper and secured by the auditor from the three other companies, so as to consolidate them and ascertain the mileage on the given day, December 31.

These separate leaves attached on the front of this report are a portion of the report as filed. I obtained my information with respect to the amount of outstanding capital of the three railroads constituting the Union Pacific System from the annual report of the Union Pacific Railroad Company. When I talk about the Union Pacific System, I mean the Union Pacific proper, the Oregon Short Line and the O. R. & N. I treat them as one system because the Union Pacific Railroad Company owns all the stock of the Oregon Short Line Railroad Company, and all but a very small amount $1,500.00, of the stock of the Oregon-Washington Railroad and Navigation Company, and because any change or variation in earnings of any one of these three companies, or in their condition, would affect the market value of the stock of the Union Pacific. It is impossible to treat them, for the purpose of market value separately.

The information contained in this report concerning the average market value of the outstanding stock of the Union Pacific is obtained from a publication issued by stock brokerage houses showing the highest and lowest quotations during the year 1911. We added the two together and divided by two. This method has been approved by the State Board of Equalization and State Tax Commission, and it is approximately correct.

225 The statement in respect to outstanding bonds of the Union Pacific was taken from the annual report of the Company, and entered in that report I believe at their par value.

The deductions in this report from the total capitalization value of the entire Union Pacific System were made for the purpose of showing how much of the capitalization of the Union Pacific System was applicable to its railroad mileage. These deductions all represent property which goes to make the value of the stocks and bonds, but which are not a part of the operated mileage of the three companies forming the system.

The first item in these deductions is auxiliary stock owned. That is taken from the official annual report of the company. It represents stocks in quite a large number of small companies, like Union Pacific Coal Company, Union Pacific Land Company, certain water companies and certain depot companies, all listed.

The next item on the list is "Investment Stocks, as per list." That refers to the list which is next attached. I arrived at the average market value there in the same way that I arrived at the average market value of Union Pacific, and in making the deduction I used the average market value.

The next item is "Bonds Owned." I got that information also from the annual report of the Union Pacific. The next is "Land Assets." That is land grant lands held by the land department of Union Pacific and not considered a part of the operating department.

The Court: Is that covered by this stock of the land company also?

The Witness: This property which I take out as land assets is the Union Pacific Railroad Company lands only. The Union Pacific Land Company lands are deducted through the deduction of stock. Union Pacific Land Company is another separate auxiliary company. The next item is "Water Line Properties." I mean by that steamships, steamboats, wharfage property, docks, and so forth, owned by the O. R. & N., which are not a part of the railroad mileage. The next item is "Cash and Demand Loans and Time Deposits." This is taken from the statement of assets as shown
226 in the annual report of the Union Pacific. The next item, "Advances for construction of new lines and steamships," is also taken from the Union Pacific annual report.

My statement, therefore, shows a total market value of all outstanding stocks and bonds of the Union Pacific of $795,511,273, from which is deducted $436,908,933, as the result of these various items I have described, leaving a net capitalization market value, of $358,602,280.

The next statement, "Miles of main track, 7,084.52; miles of second track, 751.54," means track of the entire system consisting of the three railroad companies mentioned. I got that information as to Union Pacific proper from our chief engineer, and as to the other two companies through the auditor's office. The next item, "Miles in Colorado. Main track 583.21 miles. Second track 5.51

miles." I obtained from our chief engineer's office. That is the mileage on December 31, 1911. Schedule No. 1 in this report gives the mileage by districts, and also in various counties. In each instance I have set down in my schedule No. 1 what is designated as taxable value exclusive of the right of way. I mean by that, as a report of the valuation was required to be made, and as it was known that the practice was not to assess at a full cash value, but to reach about a one-third valuation, I entered in the valuation column as the taxable valuation, as near as I could ascertain, one-third of the actual valuation. I refer to the valuation of the physical structure only, in that case in schedule 1 exclusive of the right of way. That does not include rolling stock or buildings or anything of that kind; just simply the track itself and the bed upon which it rests and such structures as that; the main track and the side tracks and second track where we have any. There is a small amount of that.

Schedule No. 2 shows the number of miles of track of the Union Pacific Railroad Company in Colorado, and that information was obtained by me in the manner described.

Schedule No. 3 shows size, character, value and location of depots, station houses, eating houses, machine shops and other buildings; that information was obtained by me from our chief engineer's office. The value put down opposite each item is intended to represent one-third of the actual par value of each structure. It was inserted because the valuation was required by the Tax Commission. Schedule No. 3 as it appears in my report consists of a large number of pages and a great many items. I believe it states every item that the Union Pacific Railroad Company had of that character
227 in the state of Colorado during the calendar year ending December 31, 1911. I requested full and complete statements from our engineer's office and believe they were given me for this purpose, and I stated them all in this report.

Schedule No. 4 shows a full list of rolling stock belonging to or operated by the railroad company within the state of Colorado, setting forth the number, class and value of all locomotives, and so forth. I got this information from our superintendent of motive power and machinery. The statement of the entire equipment of the Union Pacific Railroad proper was furnished me in detail. That I divided myself to show the proportion used in the State of Colorado. In the case of locomotives and motor cars which have a definite location I reported the actual assignment. In the case of freight cars I apportioned the Colorado portion on the basis of car mileage. I secured from our auditor of equipment service account a statement of all freight car mileage made on the line of Union Pacific proper, also a statement of the entire number of miles run by freight cars within the State of Colorado, and gave Colorado its proportion of the entire list in the ratio which the car mileage made on the Union Pacific lines in Colorado bears to the car mileage made on the entire Union Pacific proper, including Colorado. I think that is the best and fairest method that could be followed for the purpose of making that computation. It is one ordinarily used and it has never been objected to by any assessing body that I know of. The

same way in apportioning passenger cars which run from one state to another. We have no definite situs. They are apportioned to the state on the car mileage basis also.

C. S. STEBBINS recalled.

Direct examination.

By Mr. Dorsey:

Since the adjournment of the court for the noon recess I have visited the office of the Colorado State Tax Commission [an-] inspected the original of the return of Union Pacific Railroad Company upon which the assessment for the year 1912 was based. In that original report all the figures of earnings and expenses of Union Pacific Railroad Company were written by the clerk in the office of the auditor who has direct charge of furnishing such matter. That is true of Schedules Nos. 7, 7-*a*, 8, 9, 10, 11, 13, 14, 16-*a* and 18-*b*. Schedule 15 was typewritten and certified to by the auditor personally. The written portions of these various schedules, except 15, were written by a representative of our office so far as earnings and expenses of Union Pacific are concerned. There were
228 some figures for taxes and some figures for Union Pacific system in those schedules which were not furnished by the auditor. Included in that which was furnished by the auditor were all figures relating to earnings and expenses of Union Pacific Railroad Company proper. That included the share of earnings and expenses assigned to the State of Colorado. This distribution of apportionment or segregation of Colorado's proportion was done by two or three dozen, perhaps several dozen employees of the accounting department. It was done in accordance with the formula prescribed by the Railway Commission of Colorado, which I mentioned this morning. The earnings and expenses of the company as a whole are all matters of fact, verified from the records of the company. That is true as to intrastate earnings in Colorado.

ARTHUR W. SCRIBNER, resumed the stand.

Direct examination.

By Mr. Dorsey:

The method by which I arrived at Colorado's proportion of certain cars and other rolling stock, in my judgment, resulted in ascribing to Colorado a fair proportion of said rolling stock.

Schedule No. 5 contained in said report requires to be shown all machinery, tools, furniture and fixtures, fuel and supplies personal property and all other property not otherwise listed, together with the values thereof, located in the State of Colorado. I obtained that information from inquiries of several officers and accounts of the company, that relating to machinery and tools was secured from the superintendent of motive power and machinery, and as to material and supplies, partly from the auditor's office and partly from the chief engineer's office. The figures set down in schedule 5 are

exactly the same as they were received by me from the various departments I have described. They were comparative figures as furnished by the several departments. I got the figures which I set down opposite each item, and which I compute into a sum under the head of taxable value, from the papers furnishing the information. By taxable value I mean one-third the actual value. I took one-third because of the agreement which I knew of, between the State Board of Equalization and the various assessors of the state, and continued by the State Tax Commission.

Schedule 6 requires a detailed description of all real and other property owned and controlled by the company in the State of Colorado and not directly used in the operation of the road, and the actual value thereof. That information is secured from
229 the right of way records and showing certain tracts of land which, although considered a part of the operating plant of the road, are not at present directly used in operation, and therefore conceded to be assessable by the local assessor and not by the Tax Commission for that year. All the lands of that character which the Union Pacific Railroad Company owned in that year are fully and correctly described in this schedule to the best of my judgment and information. The taxable value set down opposite these properties is ascertained through examination of the assessments made by the local assessors. The local assessors had assessed the same properties for prior years and my recollection is that I entered the same assessments that had been made for previous years. All of these properties were assessed for the year 1912 by the local assessor. I believe those tracts are all in the city and county of Denver.

Schedule 6-*a* requires a statement of property not connected directly with the operation of the corporate business, and representing property taxed elsewhere. That is covered by the loose paper sheets which you referred to at the commencement of my examination, showing deductions of securities and lands and other properties. Those that we have described are the full deductions I made. I made no deductions of any property located in the State of Colorado except this mentioned on Schedule 6 which is locally assessed.

Schedule 7 requires a statement of gross earnings upon road operated within the State of Colorado for the year ending December 31, 1911. That is prepared by the auditor's office. That is one of the Schedules that was referred to by the witness who preceded me. It was written into my report by Mr. Hodge of the auditor's office. I made no change in it after that.

Schedule No. 7-*a* calls for a statement of gross earnings upon road operated within and without the State of Colorado for the year ending December 31, 1911. The information under that head was entered by the auditor's office, the same as schedule 7. I have made no change in it since I got it from the auditor's office.

Schedule 8 calls for a description of the capital stock the amount of capital stock and the market price per share. The schedule was [filled] in the auditor's office the same as No. 7. No change was made in it by me after it came into my possession.

230 Schedule 9 calls for the funded debt, mortgage bonds, miscellaneous obligations, income bonds, equipment trust obligations, and so forth, December 31, 1911. That information was obtained from the auditor's office in the same way, that office made the entries upon the report, and I made no change in it after it came into my hands. I might state, it is my understanding that these two last mentioned schedules covered Union Pacific proper only; that that is supplemented by my statement referred to at the commencement of my examination by the entries of similar information for the system.

Schedule 10 calls for a statement of expenditures for maintenance and operation, excepting taxes, for the road within the State of Colorado for the year ending December 31, 1911. That information was written in by the auditor's office in the same way, and not changed by me thereafter.

Schedule 11 calls for a statement of operating expenses, that is expenditures for maintenance and operation, except taxes, for entire system of road within and without the State of Colorado, for the year ending December 31, 1911. That information was entered in the same way by the auditor's office and not [change-] by me in any way.

Schedule 12 calls for a statement of taxes paid in each of the states in which the railroad operated for the following years ending December 31, excluding United States Internal Revenue taxes, and then a list of the year for which the information is required and a list of the states. That information was furnished by me from my office records. It is a part of my business to attend to the payment of these taxes in the various states mentioned. I know what taxes are paid in each state for the years described. These entries are correct as shown by my office records.

Schedule 13 calls for a statement, first of the entire gross earnings of the railroad company in Colorado for each month of the calendar year ending December 31, 1911, and, second, of the entire gross earnings for the whole system within and without this state for each month of said calendar year. That information was furnished by the auditor's office and not changed by me in any way.

Schedule 14 calls for a statement of dividends, rate and amount of dividends paid for each year ending December 31, and then follows two classes of stock, common and preferred, and a list of the years for which the information is asked. The auditor's office furnished that information; it was written in by them and not changed by me in any way.

231 Schedule 15 requires a statement in respect to the independent car lines and cars of such car lines passing over our tracks. I got that information from the auditor's office. That statement was written out by them in the manner heretofore described, except written in typewriter by some employee of the auditor's office; made up in the office of the auditor of service equipment, and sworn to by H. J. Stirling, Auditor, his signature certified is on the original. No change made in it since Mr. Stirling swore to it and delivered it to me.

Schedule 16 is headed "Recapitulation," with this note: "This recapitulation relates to the property, earnings, expenses, and so forth of the road in Colorado." That part of the schedule relating to mileage was prepared by me from information secured from the auditor's office, the chief engineer's office, and other sources, and correctly stated the facts as they existed, as near as I could ascertain. The remaining statements in schedule 16 were prepared by me and contain a recapitulation of the information contained in Schedules 1, 3, 4, and 5; also information contained in schedule of lands and town lots, which is the right of way and station grounds of the company. The schedule of lands and town lots, known as the land record, is not a part of this report. It was filed separately and is in the hands of the Tax Commission. It was not required to be rewritten every year, but simply corrections made in it. That schedule of lands and town lots specifically described a large number of tracts within the limits of cities, but as to the right of way shown throughout the country, we merely stated the acreage within a county. The statements therein contained were correct. The acreage as to right of way was correct as near as I could ascertain it from the right of way records. The specific descriptions and acreage given covered all of the property of that character owned by the Union Pacific in the State.

Schedule 16-*a* relates to gross earnings and operating expenses and net earnings per mile and taxes paid, covering lines in the State of Colorado only. It was all written in the auditor's office, except the deduction of the taxes which was shown by the auditor's office in this same schedule was put in again by me, and a subtraction made and a rate per mile figured and entered by me. The figures the auditor placed there are the same now as when he put them there. The figures put in by me are correct.

Schedule 16-*b* relates to the entire system. The information relating to the Union Pacific Railroad Company proper was entered by our auditor's office, and entries made by that office un-
232 changed by me. The second part relating to earnings and expenses and net earnings of the Union Pacific System for the year ending June 30, 1911, and the average mileage for that fiscal year was entered by me, taken from the annual report of the company. This annual report of the Union Pacific Railroad Company covers the operations of what we call the Union Pacific System, which covers three railroads, the Union Pacific, Oregon Short Line and Oregon-Washington Railroad and Navigation Company. The figures that were placed in this schedule 16-*b* by the auditor's office are the same now as they were first there entered by the auditor. The figures entered by me are correctly copied from the annual report for the year ending June 30, 1911. This schedule specifically states that the figures relating to the entire system of three railroads cover the fiscal year ending June 30, 1911.

This report was made upon blanks furnished to me for that purpose by the State Board of Equalization. After it was completed it was sworn to by me and sent out to the Secretary of the State Board of Equalization, some time in the month of April or May, 1912.

My recollection is it was in April. The State Tax Commission assumed jurisdiction of these assessments shortly after that, supplanting the State Board of Equalization, so that the final assessment on railroads for the year 1912 was made by the State Tax Commission. In making up this report to the State Board of Equalization, I made complete inquiry of all officers of the company having the information necessary to fill in and complete the report, as required by the State Board of Equalization or the State Tax Commission, and furnished everything that I could obtain bearing upon the subject.

I know the State Tax Commission afterwards made an assessment on the property of Union Pacific in Colorado for the year 1912. The assessed valuation as found by the Tax Commission was $7,688,130. In my judgment that was not less than one-third the actual cash value of the property. I am satisfied, and was informed, that before arriving at their assessment, to verify the figures which I returned, or independently to acquire information regarding the properties of Union Pacific, my reports had been very carefully checked by the State Tax Commission, both as to the statements of physical property and values of physical property and also as to the market value of stocks and bonds. I was informed that where I had stated the stock and bond value upon the par value basis the Tax Commission had had that refigured, taking the average
233 market values of the bonds, and had arrived at somewhat less amount than the par value shown by me.

I have no means of knowing what was the physical valuation or the reproductive value of the property of the Union Pacific as found by the Tax Commission in connection with their assessment. The recapitulation at the end of the report shows the physical valuation I returned. For the one-third value of the physical property the return shows $5,694,666.04, or on a physical valuation per mile on the one-third basis of $9,764.52. That would be a physical valuation per mile on the basis of about $29,200 and a little over.

My jurisdiction extends over this line of railroad of the Union Pacific into the state of Kansas. Kansas joins Colorado on the east. The line of Union Pacific Railroad from Kansas City to Denver passes through Kansas and over the common [bound-ry] line and through Colorado to Denver, about 445 miles of that line in Kansas and about 194 miles of the same line continued in the State of Colorado. Recently under a statute of Kansas a certain board of experts called the Public Utilities Commission of the State of Kansas has been engaged in arriving at the physical valuation of railroad lines in Kansas. They made an examination and determination as to the physical value of the line of railroad of the Union Pacific which runs through Kansas and up to the Colorado line on its way to Denver. I have a published report of that examination showing the results. It was intended to cover only the physical value and not intangible values. That valuation was completed in the year 1912. The present physical value of the entire mileage in Kansas as shown by that report for 1187 miles, which includes main lines and branches in Kansas, was $27,495. per mile. The next page of the report says that if Section No. 1, Kansas-Missouri State line to

Topeka, which includes all the double track in that state and the extensive terminals and shops at Kansas City, Kansas, is excluded from the above totals, the total present physical value per mile of first named track will be $23,442.03. The physical value per mile returned by me here in Colorado for the same year was something over $29,200. For the purpose of comparison, I have taken 221.76 miles of the west end of the Kansas main line, immediately east of the Colorado line, representing a little more mileage than there is of that line in Colorado. The figures are shown in detail here, which gives a physical valuation of that line, exclusive of what is called general items, which were valued for the whole system and then prorated per mile. The physical valuation of these 221.76
234 miles as reported is $17,500 per mile. These general items which are referred to, which cover rolling stock, law expenses, stationery and printing, insurance, taxes, interest, and commissions, store supplies, material and so forth for use in Kansas, amount to $6,470 per mile, making a total for that 221 miles of $23,970. That is the finding of the Kansas Public Utilities Commission as to the line immediately east of the [bound-ry] line between Kansas and Colorado.

After the State Tax Commission had fixed the assessment as an entirety of all the property of Union Pacific in Colorado, they then certified it out in accordance with the number of miles in each county. That is what the statute requires. In doing that they simply divided into the whole the number of miles of main track without regard to where the track is or whether it is a good or bad line of railroad; just the average per mile of the entire property within the State. Then they certified to each county a valuation equivalent to that average per mile valuation multiplied by the number of miles of main track in that particular county. The [avreage] value per mile of the company for the year 1912 was $13,183. The amount thus certified to Weld County was $3,613,250.

The lines of Railroad belonging to Union Pacific Railroad Company which were situated and operated in Weld County during the year ending December 31, 1911, were: The portion in Weld County of the line running from Denver to Cheyenne; a portion of the line from La Salle Junction in Weld County to Julesburg to a connection with the Nebraska division main line; a portion of the main line from Brighton to Boulder; some forty miles of branch lines east of Greeley; a portion of the line running from Sand Creek Junction near Denver to La Salle, and a portion of the line running from Dent in Weld County to Fort Collins. Of the line running from Denver to Cheyenne there is in Weld County 73.71 miles, and of the line running from La Salle to Julesburg 31.24 miles; those two are what might be called a main line mileage, about 105 miles. The balance of it is branch line mileage. My information is that the branch line mileage in Weld County is not profitable. I should say that the average value of the mileage in Weld County, including the branch lines it having a much greater proportion of branch line mileage than any other of the counties of the state, would be considerably less than the average value of the entire mileage of the Union

Pacific in the state taken by itself. Notwithstanding that, the state board certified to Weld County the full average value for each and every mile of railroad belonging to Union Pacific in that county, according to the average value for the entire state as they found it.

235 The Union Pacific has in the past had difficulty with Weld County with respect to taxes. As a matter of fact, the Union Pacific has been dissatisfied for a number of years. It commenced, I think, in the year 1909. For the year 1909 nothing, however, was done, but for the ytar 1910 we commenced to contest the taxes, believing that the proportion we were required to pay in that county was much more than any just proportion based on the assessment of the general property. The complaint we made in respect to the assessment for 1910 was substantially the same as we are today making in this suit respecting the assessment for 1912. We made tender in the year 1911 of a portion only of the taxes arising from the assessment for 1910. We tendered in that year the state taxes in full and withheld forty per cent of all the balance of the taxes. We afterwards brought a suit in this court against Weld County and its officers, the result of which was: before coming to a a final hearing of that case the taxes for the year 1911 had become due and a like tender was made, the conditions remaining practically the same. The Union Pacific was making a like complaint in respect to the taxes for 1911, although it had started no suit. In about March 1912, after the tender had been made of the first half of the taxes for 1911, we had some conferences in Greeley with the Board of County Commissioners and the assessor and county attorney. I would say there was practically no result from the first conference. About April 1st we had another conference, at which a settlement was arranged for the taxes for the two years. The result of the settlement as arranged was that the company paid practically on the basis of twenty-five per cent of the value instead of thirty-three and one-third per cent, or practically seventy-five per cent of the taxes as charged, except that it had paid the state taxes in full for 1910. In the suit directed to the taxes for 1910 we had secured an injunction, claiming excessive forced taxation. The assessor of Weld County during this time was Mr. A. R. Fischer. He was the assessor who made the assessment for the year 1910. He made the assessment for the year 1911 and also for 1912. He also made the assessment for the year 1909 in Weld County. That is the same A. R. Fischer referred to in the exhibits attached to the affidavit of H. C. Fairall heretofore read and particularly in Exhibit B. I know that he was a member of that committee and secretary of the committee.

The valuation placed upon the property of Union Pacific Railroad Company in Colorado by the State Board of Equalization for the year 1909 was $6,785,800, being an average valuation per

236 mile of $14,255. I know the agreement between the assessors and the State Board of Equalization was considered to exist in the year 1910; I have been told so many times. The valuation placed by the State Board of Equalization upon the property of Union Pacific in 1910 was $7,339,180, an average valuation per

mile of $14,872. This increase was partly an increase in the finding of the Board, as to the value of the property, partly owing to new property. In the year 1910 some of those branch lines in Weld County were practically completed, but were not operating. The track was laid on a considerable portion of that mileage, but the law required *to* apportionment of these values over operated mileage, so that the taking in of the valuation of the partially completed branch lines into the total valuation of $7,339,180 and apportioning that over operated mileage made a rather higher rate per mile than there would have been if the branch line mileage had not been taken into the apportionment.

The assessment found by the State Board of Equalization on the property of Union Pacific Railroad Company in Colorado in the year 1911 was $7,688,130, or an average per mile of $13,775. The mileage of branch lines to which I have referred was taken into the apportionment, so there were more miles of main track to apportion the value over, and hence resulted in a less average per mile. The total valuation in that year was increased over the preceding year. There was some more branch line mileage to account for that increase. The reason for the shrinkage in the per mile average value was because these new lines had been put in operation, and so must be taken into consideration in determining the distribution, under the state statute.

The assessment for the year 1912 by the State Tax Commission of the property of Union Pacific in Colorado was $7,688,130; remained unchanged from the previous year. There had been a very small part of the line from Dent to Fort Collins that came in that year, all in Weld County, about nine miles. That and the extension of that line into Larimer County was the only addition.

In connection with our complaints regarding the assessments made in Weld County by the local assessor in the years 1909, 1910, 1911 and 1912, we have met and discussed the matter with the assessor and Board of County Commissioners particularly, also the County attorneys and the treasurer and clerk have been present at the time of these discussions. Our complaint as outlined to these
gentlemen has been uniformly that in our judgment, and as
237 shown by our investigations, the general property of Weld
County, outside of railroad property [hadn't] been assessed at an average to exceed twenty per cent of its value, while the Union Pacific was assessed on the basis of one-third of its true or actual value. Mr. Fischer, the assessor, was present at several of these conferences. Probably three or four of these conferences at which I was present occurred prior to the time when Mr. Fischer made the assessment in Weld County for 1912; representatives of the tax department were there at Greeley often and discussed the mattrs with county officers. The suit relating to the 1910 assessment had been brought prior to that time too. A settlement of the taxes for 1910 and 1911 had been discussed prior to that time.

Q. It appears from Exhibit C attached to the affidavit of H. C. Fairall heretofore read, that in October, 1910, a taxpayer of Weld County, L. K. Mulford, made complaint to the State Board of Equali-

zation, and that Mr. Fischer, the assessor of Weld County, was called upon to appear before that board in respect to the assessment made by him in the year 1910. Were you present at the time he appeared before the Board?

A. I was present on at least one occasion when Mr. Fischer was called before the State Board of Equalization about that time—in the fall, in respect to the assessment of 1910.

The matter was gone into before the Board of Equalization quite thoroughly. A good deal of the data which the Union Pacific had was presented at that time. We had appeared before the Board to make an appeal for an equalization of the assessment of the Union Pacific with the assessment of the counties, and particularly Weld County.

I believe Mr. Fischer did not make any change in his assessment roll, in compliance with the letter sent to him on October 18, 1910, as appears from the affidavit of Fairall, directing him to make changes in the assessment roll to correct these faults.

At the fall meeting of 1912 of the State Tax Commission Union Pacific Railroad Company sought to obtain relief before that Commission in respect to equalizing and adjusting the assessment of its property located in Weld County with other property located in Weld County. It filed a petition to that effect, as alleged in its bill. The State Tax Commission did not do anything about it. We requested a date for hearing on the petition, and no date was fixed and the petition was denied.

The paper marked complainant's Exhibit B is a copy of the abstract of assessment in Weld County for the year 1912. That is the assessment which the Union Pacific is now complaining
238 of. I believe there is a law in the State of Colorado which requires this abstract of assessment to be [*be*] filed by the assessor with the State Tax Commission on or before a certain day under oath of the assessor.

Exhibit B offered in Evidence.

Prior to a recent time that law of Colorado required these abstracts to be filed with the state auditor. These abstracts of assessment filed in previous years by various county assessors are published in the biennial reports of the auditors of Colorado, which are official publications of the State. As appears from the biennial report of the Auditor of the State of Colorado for the years 1909 and 1910, which you now hand me, the assessment as made by the county assessor for the year 1909 in Weld County is not footed separately from the assessments made by the State Board of Equalization for that particular year; the total is given as $17,179,277. The report shows the deductions made by the assessor in that year on account of the $200 exemptions allowed by the constitution to the heads of families is $572,400.

For the year 1910 the total valuation placed by the local assessor in Weld County for assessment purposes upon all property subject to his assessment is given in this report as $15,472,170; deductions on account of $200 exemption, $570,200. The assessment for 1909

gives the number of military polls in Weld County as 4572; for 1910, 3911.

As appears from the biennial report of the Auditor of the state of Colorado for the years 1911 and 1912, the valuation placed by the assessor of Weld County in the year 1911 for assessment purposes on all property in that county subject to his assessment was $15,402,650. The abstract there states the amount deducted for that year on account of the $200 exemption $512,800. The net assessment made by the assessor for the year is $14,889,850.

Plaintiff's exhibit B gives the total valuation found by the assessor of Weld County upon all propery subject to his assessment for purposes of taxation for the year 1912 as $15,941,810; deduction made on account of $200 exemptions $520,600; net assessment by the assessor $15,421,210.

I have had a great many investigations made for the purpose of finding out what properties there are in Weld County subject to assessment by the local assessor and their value, and what relation the assessment made by the county assessor bears to the actual value of the property, and have spent a great deal of time and
239 labor investigating these matters. This has been done under my direction; I have done very little of it myself. The principal part of the investigations has been along the lines of ascertaining the selling value of the lands in the county, for the reason that the lands constitute by far the greater portion of the taxable property of the county, and to ascertain the assessed valuation of the parcels of land which have been sold. My assistant has been instructed to go through the records of transfers in the county, of warranty deeds particularly, and to take all transfers just as they came of record where it appears from the record that the considerations shown in the deeds represents the price paid. Anything about the transfer that seems to show it was not a real sale, or did not represent the price paid was excluded. Anything that appeared to be excessive in the consideration from information which my assistants could obtain they were to ask questions about; they were to exclude those sales. Also deeds of one dollar consideration, or deeds from one member of a family to another, or anything that appeared not to represent an actual transaction were excluded from the list. Otherwise, instructions were to take everything. My assistants have been at that for about four years, and during that time have been through all of the warranty deed records, and I think some of the records of special conveyances, and they have made up lists of all those transfers by warranty deed such as I have described, and have ascertained the assessed valuations placed upon this sale property. I think these deeds so taken have been all deeds of this character which have passed in Weld County since January 1909; I am not quite certain without referring to the record; about that time. These investigations have related to lands in the county of every character except town lots and improvements thereon; and in comparing the sale values of these lands with the assessed value we have shown the assessment inclusive of land and improvements.

According to plaintiff's exhibit B, abstract of assessment of the

assessor of Weld County for 1912, lands exclusive of town lots and improvements thereon, are about sixty per cent of the entire assessment by the assessor, not including railroad property or other property assessed by the State Board of Equalization.

(*Affidavit of A. W. Scribner Introduced in Evidence.*)

There were during the year ending December 31, 1911, exceptional values attachable to properties of Union Pacific outside of Colorado and not represented by like values attachable to property of Union Pacific within the State of Colorado. I have one
240 item: On December 31, 1911, which is the date on which the physical property lists are returned, the Union Pacific system had 746 miles of double track railroad in states outside of Colorado, and only five and a half miles of double track in Colorado. Another thing showing exceptional value is that the net earnings of the mileage in Colorado was only about one-half of the average net earnings per mile of the system, including Colorado. Necessarily, to conduct this larger amount of traffic outside of the state a greater proportionate amount of rolling stock must be used. These three items I think cover the principal claims of exceptional values. These exceptional values existed during the year 1911.

The various cities and towns and school districts in Weld County are mentioned in the exhibit attached to my affidavit. Cities and towns and school districts organize and exist under the general laws of Colorado.

In my examination yesterday I spoke of some added mileage included in the Union Pacific assessment for 1912 and not in 1911, being added in the meanwhile; that referred to the branch from Dent to Fort Collins, a new branch, of which 8.52 miles was in Weld County and 16.57 in Larimer County, making a total of 25.9 miles. That was included in the 1912 assessment and not included in the 1911. I do not think the 1911 assessment embraced any value at all on account of that property. It was open and in operation on December 31, 1911; I think it was not opened and in operation until late in the year 1911.

According to the assessment of Union Pacific property per mile for 1912 and net return per mile, in Colorado, as shown by our report, the net earnings of the Colorado mileage for the year ending December 31, 1911, after deducting all taxes except the Federal income tax, were $2,477.12 per mile. The assessment per mile for the year 1912, based on this report was $13,183, being one-third of $39,549 per mile. The net earnings as shown were about six and one-fourth per cent return on the actual valuation.

Notwithstanding the added mileage of the Dent to Fort Collins branch, there was no increase in the total assessment of Union Pacific in Colorado in 1912 over 1911. I don't know the process of the board in arriving at the valuation, but I do know that in our representations in regard to the assessment we had claimed that in the year 1911 and for some years sufficient allowance had not been made

on account of exceptional values outside of the state, particularly in the stock and bond valuation. My understanding was that
241 in using the stock and bond valuation as one element no allowance of deduction had been made on account of property outside the state. We claimed the 1911 assessment was excessive for that reason, but whether that is the particular thing that caused the assessment to be let alone for the next year I could not say.

The State Tax Commission has made an assessment of the property of Union Pacific Railroad Company in Colorado for the year 1913. Prior to 1913 the custom and practice of the State Board of Equalization and State Tax Commission has been to ascertain the full cash value of the property of the railroad company and divide that by three for assessment purposes. When it came to 1913 we were informed that the Tax Commission intended to assess all property of the railroad company and public utility companies under their jurisdiction at the full cash value. The value placed by the Tax Commission upon the property of Union Pacific Railroad Company in Colorado for 1913 was [alomst] exactly three times the assessment as fixed for the year 1912; there was an addition of about $52,000 in actual value. That assessment was found and determined after I had made my report to the Commission and they had made such investigations as they make in respect to such matters. I have no means of knowing how careful an investigation they made, except that I understood they were making a careful examination and figuring all elements of value, and I know that we have been required to report very fully as to all things to be taken into account, physical valuations, stocks and bonds and earnings.

Cross-examination.

By Mr. Tew:

I have been Tax Commissioner and head of the Tax Department of Union Pacific Railroad Company for twenty-two years. Prior to that time, for about three years, I held a subordinate position in the land and tax department. One of my duties is to make the general statements to the different taxing officers of the government. I state among the taxes paid the tax to the government of the United States and the Federal income tax; that tax is paid on the system. The Federal income tax is entirely handled by the officers of the company at the New York headquarters; I don't attend to that. I am familiar with the final result concerning that particular tax which is paid on the Union Pacific proper. In my statement I give it simply for the Union Pacific proper, not for the entire system.

242 I have subordinates under me in the taxing department of the Union Pacific Railroad proper. The Oregon Short Line is not under my jurisdiction. I have no reports that come to me usable by me as a basis for tax concerning the Oregon-Washington Railroad and Navigation Company except from general reports of the company. The matters in my reports concerning those branches of the system come to me through the accounting department, to

which I frequently go for information. Other matters of information needed by me come to me in the same way. I depend upon reports that come in the different departments and my [ac-ess] to the departments. In regard to branch lines I have [ac-ess] to the same reports, if the information was kept in the same way.

During the time I have been head of the Tax Department I have made efforts in a number of places to readjust the several assessments in different years. My business has been for twenty years, aided by my assistants and such reports as I could obtain devoted particularly to an endeavor to secure a fair assessment. In very many cases we asked for no reduction. We have never asked for an increase in our taxes after having been fixed.

The Union Pacific proper is the road that is known as the Union Pacific Railroad, consisting of about thirty-five hundred miles, being the line extending from Council Bluffs, Iowa, to Ogden, Utah, from Kansas City to Denver, Denver to Cheyenne, and the various branches of those lines. It includes the Julesburg branch, diverging from the line near the east line of Colorado and extending to Denver, the Fort Collins line, and many other branches. It is managed from Omaha. I refer to it in my statements to the officers for taxes, and in the testimony I gave here when I did attempt to make any segregation of the system, as the Union Pacific proper.

I also mentioned the Union Pacific system. That is the whole system that is owned by the Union Pacific Railroad Company, either directly or through the ownership of stock. It is under different superintendent heads, divided up into different branches. Some certain divisions of the railroad are under the superintendence of different heads.

In the tax schedule I filed with the State Tax Commission of Colorado in 1912 I filed a statement concerning the system in general compliance with the laws of Colorado, in which we tried to meet all the requirements of the law and of the Tax Commission in respect to furnishing information. I think there was no requirement in the
243 blanks providing for a physical valuation of the system, but simply of the lines in Colorado. I am not sure as to whether under the law of Colorado, particularly section 95 of the laws of 1902, I was required to give to the State Tax Commission a statement of the physical valuation of the road. In April, 1912, when I filed the schedule, I knew that the Tax Commission was calling for certain information, as provided in the blanks, which information we filled in the blanks. We have given the earnings in total within and without the state of Colorado. We made a statement giving the total indebtedness of the road in the form of bonds outstanding of the system. We did that in conformity with the law. I knew that was a command. I knew that we were required to state the aggregate value by giving the average market value of the outstanding stocks, preferred, common or any other class, of the corporate owner of the entity, for purposes of taxation, and in the schedule we filed we endeavored to conform to those requirements.

Q. Are you not required and did you not make your statement to the taxing body upon the assumption that you should return the

earnings of the road entire—the system—within and without Colorado—net earnings and gross earnings?

A. Excepting as to possibly some doubt as to what is meant by "system" in your question, I should say yes.

The schedule I filed shows that I made effort to conform to such a statutory provision and requirement. By my schedule I made effort to supply information which might be considered as [*as*] an element or factor in fixing the value of the property within and without the state of Colorado. That would give three principal factors which might be considered as bearing upon the question of entire valuation per mile. I stated in response to questions by counsel for complainant that the total number of miles in Colorado was five hundred and something, and the total mileage of the system on December 31, 1911, was 7,084.52 miles. Those figures were given for the purpose of averaging up the mileage, one of the items or some of the items of information I think the object in supplying all this information is to assist in obtaining the value for taxation of that part of the company's property situated within the state of Colorado. Under the law it must be upon a mileage basis for the purpose of distribution within the state.

The object of this schedule was to obtain the correct conclusion as to value per mile of the miles of this railroad system within Colorado. The statutory command that we make return as to matters concerning mileage within and without the state has such bearing as it might have upon the question of valuation within the state,
244 the purpose being to obtain a correct valuation per mile, considering every element of value that enters into the value of the property within the state. There might or might not be a difference between value per mile physical and value per mile of the system when you take into consideration the intangible rights. I think when you come to the proposition of value, that the value can be only one thing; that there may be several matters considered in arriving at that value, but that value is the one thing after found.

When I made my statement to the Tax Commission, I made a statement of the net earnings of the railroad in Colorado, and a declaration of the net earnings per mile in Colorado. That was required by the blanks furnished by the Tax Commission and the statute says we shall furnish all information required by the State Board.

The earnings per mile of the Union Pacific in Colorado being much less than the average earnings per mile in other states, necessarily the capitalization of the Colorado earnings would bring a less rate than a capitalization of the average earnings of the system. I made representations bearing upon that subject for consideration by the Board. I don't remember urging the board to follow that estimation rather than the whole system. It would occur to me that they would assess Colorado mileage on a capitalization of earnings of all the line.

I know there is one section of the Colorado statute that appears to indicate the principle of obtaining the valuation of the property as a whole and reducing it to mileage and taxing the mileage, but

there are other sections read with it which would show that the Board might use any just method, even the cost of reproduction if necessary. The system of value of the whole mileage of the whole system to determine the value per mile is somtimes alluded to as an importation of value. In tendering to the taxing board my statement of net earnings in Colorado per mile I was excluding the importation of any value [*a*] returned to the road from outside of the state. I knew the section of the Colorado law requiring that the entire earnings be considered. The whole earnings were given for consideration, as well as the Colorado earnings If you take the average entire earnings of the system and disregard the average earnings within the state of Colorado, the earnings of the average mileage being more [*that*] the earnings in Colorado, I would think that you were importing values from other states.

I can and did obtain from the several auditing departments before I made my statement in 1912 concerning the business of the road in 1911 the total net earnings of the system and the total out-
245 lay of the system, for the year ending December 31, 1911 as to Union Pacific proper; for the whole system as we call the three companies, that was for the calendar year ending June 30, 1911. We considered the requirements of the law complied with when we gave the Union Pacific proper, but the statistics relating to the whole system was put in for additional information; just so as to have it in there for assistance to the officers. If, for the further assistance of the officers, some object of getting at a more correct assessment had [*promoted*] me to make a report concerning the whole system instead of as to part of it concerning its business and transactions for each day of the year 1911, I could have secured those figures by taking time. Then given the total main track operative during the year 1911, and total incomes and outlay of the system during that year, I could have told with exactitude the average net income per mile of the system. It is true that it is more difficult to obtain the net or gross earnings concerning one particular mile of the road than it is the average mile, taking the income from the whole road. It would be more difficult if it was a branch of the road, and if you took two branches it would probably again become more difficult, and if you took three [*of*] four it would depend on where the three or four were situated as to the difficulties of it. The earnings of any particular branch or part of the road may be ascertained approximately, at least, in the same way as the earnings of the road within any one state, but it is expensive to do that to divide those earnings.

The incomes come from carriage of freight and passengers, and the freight and passengers traverse over branches in part and in whole. A passenger will sometimes get upon a branch line and traverse on that ticket the whole main line and the branch, or part of the main line, or part of two branches and the main line, or parts of three or four branches and the main line at the same time. I believe we issue tickets called mileage tickets in conjunction with other roads and they are usable all over the main line and branches

at any time, I think for whatever distance he wishes to travel. And in freight the shipments started in Colorado, some of them, and terminated in other states of the railroad. So if a person were given a particular number of miles of railroad in most any place, it would involve a great deal of accounting work to ascertain what was the portion of the total net earnings of the road for the particular mileage given, and when the result was obtained it would be an approximation according to the best method obtainable. It could probably be done in one case as well as in another. We could obtain
246 with exact accuracy the average per mile for the whole system; for a part of the system you can obtain it with approximate accuracy very closely, I should say. I stated that the taxable valuation of the road as fixed by the Tax Commission in the year 1912 was $13,183, per mile, and the net earnings a little over twenty-five hundred per mile. The method of calculations and deductions by which I came to that conclusion is that the taxable valuation found by the commission of $13,183 per mile represents one-third of a total valuation per mile of $39,549; that the net earnings of about $2,470 per mile represent an earning of about six and one-fourth per cent on the actual valuation as found by the Commission of $39,549 per mile, assuming that the net income of the road in the state was approximately twenty-four hundred a mile. I don't understand that that is exclusive of any importation of values at all. I understand that they include all elements of value. That is an approximation of our net earnings in Colorado, according to our report. I understand that would be excluding any importation of value other than value of the Colorado miles.

I think the road ought rightfully to earn more than six and one-fourth per cent. The question had been [*discussion*] by tax commissioners a great deal, and I think most of them have assumed that about seven per cent would be a fairer allowance. The value per mile of the system as a whole is on the last page of my report. That is a little less per mile than the system proper. That is because some other parts of the system do not earn as much per mile as the average of the Union Pacific proper.

I file statements concerning net and gross earnings in other states than Colorado. I file one in Nebraska and Kansas. It is my recollection that the net earnings per mile in Nebraska, as segregated to it, was about $6,400 per mile, after deducting taxes. In other states we put in a return of earnings and expenses, according to the reports of our accounting department, as well as Utah. The highest net earnings reported were in Nebraska. For that particular year Kansas was the lowest, I think.

The schedule was compiled under my direction and I sent it out for filing. As to part of the schedule there was an affidavit of the auditor of the road attached. He certifies to its correctness as to the total mileage and daily average mileage of express, sleeping and private and other line cars over the Company's road for the year ending December 31, 1911. That is all that he certifies to in this

report. So far as the schedule shows it is authenticated by
247 myself in all matters other than the limitations mentioned by Mr. Stirling. I gathered from the different departments statements or data compiled in that schedule.

In the statement in the schedule intended to be descriptive of the average value of the stocks, preferred and common, and of the bonds of the Union Pacific system in 1911, I think in stating the bonds I gave simply the par value. I was informed that was a little too high. I didn't mean that I was complained to by other parties of the road that I had given too high a value. I had been told this by the Secretary of the Board, possibly some member of the Board, I am not sure as to that. Before I made the statement Exhibit A I did not figure out what the value of the outstanding bonds was, because in glancing through the quotations it seemed to me that they would average about par. This method of valuation encompasses the addition of the average value of all of the outstanding bonds and stock, preferred and common, of the road, and then I make certain deductions which I feel should not be included in the total value because they represent properties that are not a part of the railroad. The lower you give the value of the outstanding stocks and bonds in such a calculation, and the higher you make the deduction before you divide the remainder by the active number of miles, the more you reduce the value per mile of road as determined by that method of calculation.

The amount of outstanding common stock is stated on the report. The average [market] value, if it is so stated on the report, is $173 on the hundred dollars. I obtained that average market value of $173 by taking Wall Street quotations, the high and low prices during the year, adding them together and dividing by two. I am not prepared to say that a good deal more accurate method would be to take the 296 market days of the year, and the opening and closing prices of the day and average the price. It can be done, but this method was generally approved by the board, and I followed it in accordance with their suggestion.

I obtained the value of the preferred stock in the same way, by taking the highest and lowest. This was the method pursued by me and approved by the board; it had been followed by the State Board of Equalization for three or four years.

The deductions that I took from it are of auxiliary stocks owned by the company, representing properties not a part of the railroad mileage of the company. They are:

The Camas-Prairie Railroad, $10,000; Central Idaho Railroad,
$220,000; Green River Water Works, $225,000; Kansas City
248 Terminal Railway, $100,000; Leavenworth and Topeka Railway, $25,000; Leavenworth Depot and Railroad, $50,000; McKeen Motor Car, $550,000; Ogden Union Railway and Depot, $150,000; Oregon and Washington Railroad, $999,300; Pacific Fruit Express, $5,400,000; Rattlesnake Creek Water Company, $78,300; Riverside Homestead, $100,000; St. Joseph and Grand Island Railroad common, $3,956,400; same first preferred, $2,429,340; second preferred, $2,719,100; Salt Lake & Idaho Railroad, $160,000; San Francisco & Portland Steamship, $500,000; San Pedro, Los Angeles and Salt Lake Railroad, $12,500,000; Short Line Land and Improve-

ment Company, $50,000; Topeka Iron, $55,000; Union Depot & Railway, Denver, $240,000; Union Land Company, $10,000; Union Pacific Coal Company, $5,000,000; Union Pacific Equipment Association, $100,000; Union Pacific Land Company, $100,000; Union Pacific Water Company, $500; Utah Light & Railway, common, $1,852,350; same preferred, $3,842,875; Yakima Valley Transportation, $499,700, making a total of $41,922,865. I also listed for deduction upon this basis for taxation investment stocks; there is a deduction there of $255,281,144. That is the value of certain stocks owned by the Union Pacific Railroad System, that is all of the three companies named. In this stock and bond method of calculation I have added in all the obligations of the system.

Putting in the 255 million dollars' worth of bonds at a little higher than their real value would tend to reduce the total value of the stocks and bonds of the road, which would give a less value per mile than if valued low. The value of these investment stocks is taken from the annual report. That is compiled by the comptroller from information secured by him. The basis of information he considered was the par value of each item of these securities shown in the annual report. I [figures] the market value, by the same method I used in figuring the market value of the Union Pacific stock. I understand these investment stocks are stock on which the railroad had made investments from time to time. I do not think they get these investments out of the incomes from the road. They paid the immediate operating expenses of the road right along, and the taxes levied against them; and in some way they became possessed of these different millions we have listed here. I do not know when they acquired these different excesses of property. They consist of stocks of other railroads. I think it has not increased much in late years. I understand they are disposing of a large amount of Southern Pacific stock. Yes sir, that was under some urgent necessity. It has in the past sold certain lines of stocks and bought others in place. I believe it hopes to always get something in return whenever it lets go. This
249 list is property belonging to the railroad company. My understanding is that they borrowed money to buy these things. There is something in the annual report to show that a large amount of these stocks are pledged, but I am not familiar with these financial transactions. I should say, from what I know of its practice, that this railroad was getting good stocks and good bonds, and a good representative of the investment they made in them.

They have got over ten millions of dollars of a railroad called the Chicago & Alton. The market value of that is forty-five, as distinguished from one hundred. We have Baltimore and Ohio stocks listed in that list at something like thirty-nine millions including the preferred. I couldn't tell the date when the investment was made. We have Chicago and Northwestern to the extent of four million dollars par value of its stock, I do not know when they invested that. There is a million, eight hundred thousand dollars common stock, preferred, Chicago, Milwaukee and St. Paul, which is one forty-eight and a quarter. That is another investment the road made. I couldn't tell you the date that investment occurred.

They have got common stock of the Illinois Central here, twenty-two million; has a market value of upwards of thirty-one million. I couldn't tell you when the railroad invested in that, or where or how it got the money to make the investment. The road had New York Central stocks of a value of nineteen million; and we have a small amount of Northern Securities stocks. I noted opposite that "No quotations." I found no quotations in the list of Wall Street quotations to which I was referring at the time. We have railroad Securities preferred, over a million; and Southern Pacific Common Stock that is worth 146 million dollars, at that time. That was before the trial of the case. When that passed out of possession of the railroad, under order of court, I presume it got the money. I understand they took the equivalent in stocks. I understand there was a modification made and they invested in other stocks, more Baltimore and Ohio, which I understand has been changed. The investment of a quarter of a billion dollars and upwards in stocks shows that the railroad company had a good many of them. That is not railroad earnings. I think the company is in first class shape as compared with other railroads in the country. It has a good roadbed, ballast, built up over the principal main lines. The best built-up roads are through Nebraska and Wyoming. The Kansas Pacific is not all ballasted. Yes sir, that is the double track. I think, as compared with railroads throughout the United States, the road is in good condition from Kansas City to Denver, and the main line, and the branch called the Julesburg, that comes into Denver.

In this list of deductions, after the 255 millions of these accumulated stocks obtained by investments, we come to an item of bonds owned of thirty-six [millions] dollars, and some two or three hundred thousand dollars more. They are from the annual report of the company. I have no information as to when the purchase was made. I think [they] did not get them from the earnings of the road. I think that without knowing anything about it, yes sir. They are: Atchison Union Depot and Railroad, second mortgage, five per cent, $4,500; Cheyenne County, Colorado, refunding five per cent, $26,200; Green River Water Works, first mortgage six per cent, $194,000; Leavenworth and Topeka Railway, first mortgage, $125,000; Leavenworth Depot and Railroad, first mortgage $63,000; Northern Pacific Terminal, first mortgage, $217,000; Ogden Union Railway and Depot, first mortgage, $163,000; Payette Valley Railroad, first mortgage, $44,000; Payette Valley and Junction Railroad, first mortgage, $140,000; Rattlesnake Creek Water first mortgage, $146,000; San Pedro, Los Angeles and Salt Lake Railroad, $24,417,000; Sharon Springs Township, $15,000; Southern Pacific, four per cent, twenty-year convertible, $927,000; four and a half per cent twenty-year gold, $66,000; Utah Light and Power Consolidated mortgage, $2,000 Utah Light and Railway Consolidated, mortgage $993,000; Collateral Trust, $5,000; Union Pacific Coal Company, first mortgage, $3,354,000; Union Pacific Land Company, first mortgage, $5,381,840; making a total of $36,283,540.

I have in the list of deductions approximately sixty-seven and three-quarter [million] dollars cash and demand loans and time deposits. The Union Pacific system is the owner of that. Its situs is

outside the state of Colorado. These are securities held in the New York office, and the cash that is held and kept account of by the New York office and not under my jurisdiction, and I could not say where they pay the taxes on it. It is money and notes owned by the Union Pacific system. The money is largely kept active. This sixty-seven million dollars which I put in the deduction would in no way enhance the value of the stock of the Union Pacific Railroad Company. I think it would not in any way affect the value of the stocks and bonds of these other roads. I think the sixty-seven million dollars is not used as a basis to tax by the stock and bond method any of the many railroads the bonds and stocks of which the railroad has invested in. There is one item out of that sixty-seven million, that is a demand loan to the Southern Pacific Company. If the
251 same is deducted here it would not be taxed in any way in obtaining the value of the Union Pacific system, not in Colorado where this property is not held. The way I have placed it in my statement it shows that it is a deduction of property not a part of the railroad mileage. I wouldn't have any means of knowing whether that money is taxed. I don't look after any Union Pacific Securities or property held in New York. The Comptroller in New York would be the best qualified, probably, to tell you whether that has paid tax on anywhere. I [didn't] think it was material to inquire of him before I made my statement to the Colorado authorities. The items making up the sixty-seven [millions] dollars are all cash assets, probably.

As to the advances, amount $27,694,499; I [didn't] consider it material to take any steps to ascertain what that was or where it had been advanced or from what funds; I put it in the deduction list from the statement of assets of the company which are not a part of its railroad. The result of putting that item in reduced the stocks and bonds representing the railroad mileage. That item of $67,745,285, and the other item $27,694,499, is property of the road which it has acquired. I have no information in regard to the way the money was secured with which these properties were acquired.

In obtaining the value per mile upon the mileage basis I did use the divisor of 7,084.52 miles. That was the mileage of the road in December, 1911. The average active miles for the fiscal year ending June 30, 1911 was 6,678.29. This 7,084.52 miles represents the mileage near the close of the year 1911. I am quite sure that included the Fort Collins branch. I think it was only the latter part of that season that we began the operation of the Fort Collins branch. I think I did not use too many miles. We didn't have the Fort Collins branch operating during all the year.

The total amount of bonds, $329,232,380, shown on Exhibit A is the value of the bonds at par. Some of the bonds of the railroad ran as high as 1.05 at some time during that year. They vary quite considerably. I think there is no set of bonds in that list at the present time that is worth up to par.

My statement Exhibit A contains statements of the physical valuation of the railroad. All of the items of physical property are entered there with the value. I got those in various ways. In regard to track values, it was made according to my own best judgment, based on

my experience and statements of the engineers. I put the track value as shown in the statement. It is different for the different districts of the road. The siding value is included; I did not state it
252 separately. The location and description is secured by me absolutely from the chief engineer's office; the valuation necessarily had to be my estimate according to my best judgment. I believe I did not omit any property.

The cost of the block system of signals for a single track railroad is about $1,100 per mile. That is not entered separately; there is nothing in the blank which calls for it to be entered separately. I had it there, certainly. It is a valuable piece of machinery recently added to the road. It is included in the mileage of track and superstructure and so forth. The statute does not say that we shall list rails separate from the tracks, or track fences or crossing signs, it is simply the track as it stands. This block system was installed several years ago; I couldn't give you the exact date.

The value of the main track as entered, on the eastern district, which is the line east [*if*] Denver, including side tracks, block signals, and the superstructure, excluding right of way value, comes to $5,840 per mile, which is one-third of over seventeen thousand dollars a mile. That does not include the buildings; separate schedule for the buildings. It includes the block signals. It didn't include some things because they are entered in other schedules. The block system is not entered in any other schedule. It is not specifically mentioned any more than certain bridges that we have. That seventeen thousand dollars of physical valuation is exclusive also of machinery, tools and supplies, which are reported elsewhere. Machinery includes machinery in the railroad shops and roundhouses. Tools and supplies are not included in this track value; they are included in our statement in other places. That track value includes all of the main track and superstructure, and all sidings, includes the bridging, crossings and signs and that sort of thing, block signals and railroad crossings; there are many items, and the ballast, ties and rails. The several headings of items included in the physical valuation per mile are in accordance with the form indicated by the blanks furnished for the returns, in the first place, track, which is main track and side track and turn-outs, including second track if any. Double track would come under that heading. All of the separate mileage of side track and second track is entered in the schedule but the rate per mile is [figures] on the main track, including second track. Everything that goes to make up the trackage is included in the track, ties, ballast, rails, bridges, sidings and turn-outs. It includes the block system, all signals included.

253 The right of way is shown by the land record, which is a separate statement required by the Tax Commission. It is a component part of the physical valuation as described in Exhibit A. It is shown in the recapitulation.

Other headings that go to make up this physical valuation are lands and town lots listed in land record, which is all of the right of way, and station grounds, yard grounds and shop grounds. Then buildings, that includes all buildings. Rolling stock is another item. That includes all cars of every character. I described them all in

my statement. Usually hand cars and push cars are called tools; they are a part of the section tool outfit. I did not state them separately; did not specifically mention any; classified usually as tools. Gasoline motor cars are in the schedule. Section foremen's velocipedes are designated tools. In tools there is a great list of small items I do not specifically describe. Miscellaneous tools at the repair shops are put in as tools and machinery; anything permanent is machinery; sometimes lumped as machinery and tools; In getting those values I go to the different reports of what we have.

In my schedule I gave the physical valuation of the Pleasant Valley Branch of the road which is in Weld County, Greeley Junction to Briggsdale and Cloverly to Hungerford, 14.15 miles. That is in the recapitulation known as schedule No. 16. We have given the number of miles and the several valuations of right of way, meaning lands and town lots, and of road, in schedule No. 1, and of the buildings from schedule No. 3 I understand that contains it all exclusive of rolling stock. That makes a total there of about 70,910.60. This is supposed to be a third of the physical value of that piece of property. I don't remember the date that was installed; some two or three years ago. The $70,910 is intended as one-third actual value. Page 14 of the annual report, June 30, 1910, shows capital expenditures for account of extensions and costs of extensions transferred from deferred assets, Cloverly to Hungerford, $264,477.01. I think that is right, it must be correct. The physical value described by me in Exhibit A does not purport to be the cost, it may be less or it may be more. This is not a very old road. The valuations per mile of track there were given without reference to the cost of the track, but as our estimate of what tracks of branch lines of that kind were reasonably worth. This physical valuation being [*fifth*] thousand dollars less than the actual cost I account for partly by the fact that this was not a productive branch. The returns were made according to my best judgment. I think this fourteen miles, called the Cloverly to Hungerford branch, first came into service some time in 1910.

254 Counsel for defendants now offered in evidence that recital on page 14 of the Thirteenth Annual Report of the Union Pacific Railroad Company for the year ending June 30, 1910, which begins with the paragraphs "Expenditures for account of extensions and costs of extensions," and the language which terminates with the figures $2,834,834.59 being the sum total of certain listed expenditures as to the cost of certain additions to the road and their extensions, being as follows:

Expenditures for Account of Extensions and Cost of Extensions Transferred from Deferred Assets, viz: Union Pacific Railroad Company.

Cloverly to Hungerford, Colorado	$264,477.01
Dent to Fort Collins, Colorado	501,210.53
Grant Mine to La Salle, Colorado	442,515.78
Greeley to Briggsdale, Colorado	313,474.97

Onaga to Marysville, Kansas	509,016.56
O'Fallon to Northport, Nebraska	287,479.51
Pine Bluffs Branch, Wyoming	27.98
Rock Springs to Coal Fields, Wyoming	7,236.60
Sand Creek to St. Vrains, Colorado	484,917.09
Summit to Lane, Nebraska	24,478.56
	$2,834,834.59

The item in my deductions from the market value of stocks and bonds of Union Pacific which recites water line properties four million dollars, in round numbers, is one of the items that enters into the total deductions. That is a general estimate of the values of those properties. There are some water line properties held by the system, which are used in connection with the water lines of the system; they are part of the property of the system but not a part of the railroad. The ships that are used are moved by steam power; they carry freight and passengers. They may carry freight and passengers which go from the boats to the railroad. Yes, that estimated four million dollars worth of property might be said to be an extension of the carriage power of this system—it would move freight. Shipments might start anywhere upon the system and still be upon the transportation lines riding upon cars or within boats, but they would not be on the seven thousand miles of railroad. Yes, they would be on the transportation unit that the company owns. No sir, nobody else owns it. That four million dollars water line properties is not an obligation of the company; it is property belonging to the company, which is not a part of its railroad. No,
255 we could not carry freight and passengers as well without that property as we could with it. It is no doubt a part of the machinery that is employed in this plant, owned by the complainant here, for the carriage of freight and passengers. It seemed to me proper to make this deduction because the effort is to ascertain the mileage part for the railroad, and it was thought proper to deduct any part of it, although it might be a part of the plant, that was not a part of the railroad plant and was not divisible into miles. If it should not be deducted the value per mile would be slightly greater, yes. It is an idea that I think is generally accepted by tax officials, that anything that is not a part of the railroad mileage, that is taken into account, ought to be deducted. If we could have used the length of these water lines in the divisor, it would not have been proper to deduct them. The other machinery not deducted is actually in use on the road; this is in actual use for the carriage of freight and passengers, but not on the railroad.

I filed at the office of the State Tax Commission, in conjunction with or in support of this annual report, other written documents, briefs or arguments. The purpose of this was simply to call the attention of the Tax Commissioners to the items or arguments which we thought ought to be considered in making up this valuation; to get the valuation made on a fair basis, whether it were more or less. There was nothing in the brief that could be interpreted "more"

unless the Commission so read it. I have not a copy of that brief that I could give you now. There was only one written argument or brief filed. We filed in conjunction with that report the annual report of the Union Pacific System, so that might be referred to. Aside from the arguments in that brief I think I did not make certain statements of fact in regard to conditions pertaining to the road as to physical conditions. I think I used some computations in that showing approximately what the practice had been. I did not state in that brief any matters of fact as to the number of locomotives that we had, or cars, or main track, or of side track, or of the value of any thereof, not generally. So far as I know, none of the declarations of fact such as I tendered here under oath for assessment purposes were in that brief.

In schedule A appears a list of properties by me stated to be located along the line of the railroad in Weld County, such as buildings and structures of different character. I did not value those in any way from looking at them; I have seen some of them but have not examined them for that purpose. I would use my
256 judgment for all of those places. This judgment that I put in the report was necessarily borrowed from what somebody else said the buildings were worth; it is made from a record of buildings which is kept in our chief engineer's office, Mr. Huntley's office at Omaha, Nebraska. His records are made up from reports of his division officers who do know about it. I would not have any personal knowledge myself of the values of those buildings and structures. Depot clocks, watches and anything of that kind would not be specified as such; we gave a value of depot furniture. This report specifies in all cases the depots, depot platforms and furniture. Clocks, I suppose, would be a part of the furniture.

Redirect examination.

By Mr. Dorsey:

In some degree, at least, this schedule or report filed by me with the State Tax Commission is made up from information furnished by or from the reports or records of other departments of the railroad, and the figures as taken by me from the reports and records there at the time are correctly stated in my report. Those reports and records are kept in the usual course of business for the purpose of furnishing information to taxing officers in respect to assessments and to all officers who may be interested in the facts contained therein; kept for all purposes, and not specially prepared for [*for*] the purpose of securing low taxes.

I never heard of anybody either corporate or individual making a complaint about their taxes because they were too low. In a majority of cases in Colorado no complaint whatever has been made respecting assessments for taxing purposes. The Union Pacific complains only on conditions where it thinks its valuation is manifestly too high or out of proportion to the valuation of other taxpayers. I should say complaints of that sort are made in possibly not over five per cent of cases.

There is not that I know of any provision of the state or any direction in these forms of reports furnished by the State Tax Commission which calls for a report by me upon the physical valuation of the property outside the State of Colorado. I endeavored to answer fully and truthfully and completely every question propounded to me by the Tax Commission, whether upon the printed report or otherwise.

I understand the stocks and bonds of the Union Pacific and the Union Pacific System are listed on the New York stock exchange. That is true of all classes of Union Pacific stocks; and true of all Union Pacific Railroad bonds; true of the bonds of the
257 Oregon-Washington Railroad and Navigation Company, and bonds of the Oregon Short Line. The fact is the average market value of any [*of any*] of these securities for any period of time is readily ascertainable by any one by a little computation and care; it is a public record, the quotations are published daily; compilations are made and circulated from time to time showing what the quotations have been on these properties and these stocks and bonds, by financial journals and pamphlets.

The three bases of assessment which the Tax Commission has to take into consideration in ascertaining this value are, the physical valuation of the property within the state, the earnings and the stocks and bonds; that is, the earnings [wi*th*in] the state, together with the knowledge of the earnings outside the state. The effort of the Tax Commission is to ascertain the entire value of the railroad property within the state. After that is ascertained it is apportioned on a mileage basis. That matter of apportionment is by the application of the rigid rule which the statute established in regard to the value of any particular mile of railroad.

I did not furnish to the Commission the net and gross earnings per mile, only in Colorado. I furnished the earnings with respect to the entire line as well.

In connection with my report after consideration of which the State Tax Commission fixed the assessment for the year 1912 I filed the annual report of the Union Pacific covering the fiscal year ending June 30, 1911; in connection with the assessment for the year 1913 I filed the annual report of the Union Pacific system covering the fiscal year ending June 30, 1912. These two reports taken together would cover the calendar year 1911. It is my recollection that the earnings for the fiscal year ending June 30, 1912, were somewhat less than for the year ending June 30, 1911; at any rate they did not increase. If they decreased, that would have a tendency to decrease the valuation of the total property based on a computation from earnings, and on a computation from stocks and bonds. So the latter part of the year 1911 would not show more value of Union Pacific property than the earlier part of the year 1911.

In giving the par value rather than the market value of bonds to arrive at capitulation, I think I gave ourselves a little the worst of it. There was a very little difference. The computations on market value showed practically the same as the par value.

258 When I stated that in arriving at the [aver*g*age] market value of stocks of the Union Pacific system for the calendar year to which I referred I took the high and low value and averaged the two, I meant the highest quotation of the year and the lowest quotation of the year on each of these stocks and took the average of these two things. Nearly all this investment of stocks and securities of that character for which I claimed a deduction from the stock and bond value are listed upon the New York stock exchange In arriving at the ayerage value of the listed stocks I pursued the same method I did in respect to the Union Pacific common stock; took the highest and lowest quotation for the year and the average from that. In cases where I found no quotation whatever I took the par value; they were small in amount. In respect to these investment stocks so listed, the quotations thereon for the year are a matter of public record, and anybody interested can look them up and see what they have been throughout the year [*of*] they choose.

When I made reference in my cross examination to the fact that some of these investment stocks were pledged, I meant that they were [pledges] as collateral to secure bonds, and subject to mortgages which secure bonds in that way. So their value is represented in part in bonds of the Union Pacific and in part in the stock of the Union Pacific.

The sixty-seven million dollars claimed as a deduction on account of moneys and cash assets consists of the following: Demand loans to Southern Pacific Company $20,007,305.41; loans to San Pedro Los Angeles and Salt Lake Railroad $1,168,860; loans to the Utah Light and Railway Company $5,498,108.14; cash $12,171,011.27; demand loans and time deposits in a lump item of $28,900,000; making a total, as stated, of sixty-seven million.

The other item claimed as a deduction of approximately twenty-seven million dollars is made up of advances for construction and acquisition of new lines, $8,131,040.03; terminal property and other lands, $13,371,596.29; ocean steamships, not a part of this water line that we discussed lately, $6,191,862.92.

The block signal system is an obvious signal connected with the railroad track, very prominent to any one who looks at the railroad track. It is rather widely advertised by the Union Pacific that it possesses an appliance of that kind. It is interwoven with the main track with signal wires.

259 Regarding the item contained in the annual report of the Union Pacific for the fiscal year ending June 30, 1910, expenditures made for extension and cost of extension from deferred assets of the line from Cloverly to Hungerford, offered in evidence as defendant's Exhibit 1, that report does not show what items are included in that cost; does not show whether or not the rolling stock apportioned to that line was included in the cost; simply shows boldly a figure as a cost. In my return to the State Tax Commission upon consideration of which the assessment for the year 1912 was made, the valuation given exclusive of rolling stock, is on the one-third basis, $70,910.60 representing $212,731.80. That is approximately fifty thousand dollars less than the figure appearing

in the 1910 annual report of the Union Pacific. We have not designated exactly the apportionment of rolling stock, but this report shows the valuation of about four thousand dollars a mile average for rolling stock in the state, and if we add the rolling stock for the fourteen miles at that rate it would be $56,000, making a total of about $269,000. That is approximately the same as the statement contained in the 1910 report of the Union Pacific Railroad Company. Assuming that my figures were fifty thousand dollars lower than the figures contained in the 1910 annual report, we would have to divide that fifty thousand dollars by three which would make about sixteen thousand dollars, and if we apportioned that over mileage in Colorado it would make a difference in valuation per mile of about sixteen thousand dollars distributed over 583 miles.

The water line properties on account of which the four million dollars deduction is made in my report to the State Commission are some river steamboats in Oregon and Washington and some wharfage property. I haven't a very good list of it. That was put in merely as an estimate, which we thought was very conservatively considered, particularly the wharfage properties. If the water line properties are to be taken into consideration with railroad lines you must add the mileage of the water line property. I should think. If you take the four million dollars and divide that by three and then distribute it over the mileage of the Union Pacific, even excluding the mileage of these water line properties, the difference in the assessable value on each mile of the Union Pacific system would be a little less than two hundred dollars.

The Union Pacific Railroad Company does not own any watches that I know of. There is no provision of the statute or in any of these blanks furnished by the Commission for me to make answers upon which requires a statement of the number of clocks owned by the Union Pacific.

260 Recross-examination.

By Mr. Tew:

As to the stocks and bonds of the Union Pacific and other railroads whose properties are a part of the system, preceding the time I made this report these stocks and bonds were active, on sale and listed in the New York stock exchange and elsewhere. In that part of the main schedule which related to stocks and bonds, which was made up in our auditor's office and was not changed by me, our auditor's office said, "Can't furnish average market value." The average market value cannot be exactly stated. It is absolutely impossible for our office to give this figure absolutely correct. It can, however, be approximated quite closely, and that is given in my statement which is attached to the report and is intended to be a supplement to the interrogatories in the schedule 8 of Exhibit A. I could not furnish the market price of the [prererred] stock issued and outstanding of the Union Pacific system absolutely and accurately.

JOHN BURDEN PHILLIPS, a witness on behalf of complainant, testified as follows:

Direct examination.

By Mr. Dorsey:

My full name is John Burden Phillips. I reside in Denver, I am a member of the Colorado State Tax Commission. Have been a member of the Colorado State Tax Commission since May 20, 1912. Prior to becoming a member of that Commission I was Professor of Merchanics and Sociology of the University of Colorado. I have been giving attention to the subjects of that character for a number of years; I taught on subjects connected with taxation at the University. I have given attention to subjects of taxation since I started in the University, 1897. I think I have more or less of a specialty the study of taxation.

The Colorado Tax Commission has had conferred upon it all of the statutory duties formerly performed by the State Board of Equalization; that would be the assessment of public service corporations as specified in the old law. In addition, the last legislature conferred on the board the assessment of all public utilities in the state. The law of 1911, which created the commission, gave them general supervisory powers over the assessment and collection of taxes, in the state. I think it provided adequate machinery by which different orders with respect to assessments made by the county assessors may be enforced. Certain provisions in the
261 law seem to confer on the commission the power to have its orders enforced, and the supreme court has decided they may be enforced, by injunction or otherwise.

The first commission was appointed under this statute on May 20, 1912. The first assessment of railroad properties in the state made by the commission was the assessment of 1912.

In making the assessment of railroad properties in the state of Colorado in 1912, the board attempted to assess at thirty-three and one-third per cent full cash value. In doing so the board first ascertained what it considered to be the full cash value of the railroad property within the state.

Exhibit A is a copy of the report filed by Union Pacific Railroad Company and considered by our commission in making the assessment of the property of that company in the state of Colorado in 1912; I believe that is a true copy.

In making the assessments for 1912, as the board was appointed on May 20th and the assessments had to be made by June 15th, after some investigation the board assured itself that in the main it would be the best to adopt the valuations of the previous year and certify them out as the valuation for 1912; this they did on a number of the larger railroad systems.

The assessments for 1913 were not made on the one-third basis, but on the full cash value basis. The State Tax Commission has had conferences with the local assessors respecting the new method of assessment, and quite a good many circulars have been sent out

explaining the new system and urging them to be very careful to get everything on the roll at its full cash value.

The State Board has already made its assessment in 1913 on the property of the Union Pacific Railroad Company. I think that assessment is something like fifty-one or two thousand dollars more than three times the assessment for 1912; generally speaking it is almost exactly three times what it was in 1912. In making this assessment for 1913 we had an opportunity to talk the matter over more carefully than when we made the assessment for 1912. In talking the matter over with respect to Union Pacific, we verified and checked up for ourselves the best we could the statements in the report filed by Mr. Scribner. The Board carefully went over the returns, and as to the stocks and bonds, the prices on those we determined largely from the Commercial and Financial Chronicle, a standard financial paper we have. The Board ascertained the
262 values of these stocks and bonds for themselves; that is their practice. In making the assessment for 1913 the board proceeded in its own way to ascertain the physical values of the property of the railroad company. The result was the total valuation was almost exactly three times what it has been in the previous year.

So far as I know, the purpose of the State Tax Commission in making assessment of properties of railroad companies is to ascertain the value of that property in the State of Colorado; the whole value of the property within the state is ascertained. When we come to distributing this total valuation among the various counties, that is done on main track mileage. It is simply an average ascertained by a rigid rule; straight out apportionment. When we certified into Weld County so much per mile for each mile of main track located in Weld County. It is not the judgment of the board that each mile of that track is worth that much money; that is following the statute providing for distribution.

In the year 1912 the board endeavored to arrive at the actual cash value of the property of Union Pacific Railroad Company located in the state of Colorado, and took one-third of that for purposes of taxation. So far as I know, I think each of the members would say that they did reach what was as near as could be determined the full cash value.

In checking over the reports made to the board by Mr. Scribner, Tax Commissioner of the Union Pacific, the board did not, so far as I know, find that Mr. Scribner had omitted any property, or believe he had in any way attempted to mislead the board respecting the property of the Union Pacific in the State of Colorado or its value. There might be slight discrepancies in the figures with the annual report of the company directors, but so far as I know we didn't find any. I don't think the board is of the opinion that there were any intentional or other serious attempts to misrepresent anything.

The board has had occasion, since I have occupied that position, to investigate the condition of affairs in Colorado respecting the relation between the assessments made in counties by the county assessors upon property subject to their jurisdiction, and the assess-

ments of railroad property and other like property made by the State Board. We have a good many instances brought to our notice of contests between railroad corporations and the local authorities. We have done some investigating, though not as much as we wanted to do if we could have gotten the force necessary to carry out the full intent of the law in this respect.

263 We have made some investigations of that character in Weld County. We have compared the Weld County valuations with the census valuations to some extent, and we have also had some transfers taken to verify in that county. This has been done at various times since we came into office. I have myself done some comparing of the assessment valuations with the census valuations. The members of the board have discussed this together in office.

Commissioner Link and myself were up in Weld County last May, not exactly for the purpose of verification, but more for the purpose of advice and looking after the assessment that was then being made. We had the investigation of transfers made by Mr. Fairall, and we also made one other trip to Weld County, early last winter I believe it was, on the request of Mr. Mulford, who claimed to be unjustly assessed. In connection with these matters we compared the census returns and valuations otherwise with the assessed valuations in Weld County. I have personally compared the 1910 assessment with the census which was taken at the time the assessment was made, and then I also compared the 1912 assessment with the 1910 census valuations, just out of curiosity to see how I was coming out.

We had Mr. Fairall go out and take off some three hundred transfers, I believe, off the county records of warranty deeds of real estate, and we asked him to verify such of these as he could; to verify the considerations mentioned in the deeds as to whether it was the consideration paid; checked up with real estate men and the assessor, or anybody he could find to find out whether this was true or not. Those results were reported to us so we could consider them.

The census with which I made comparisons in Weld County was taken during the month of April, 1910, if I remember correctly, and the enumerator was instructed to ascertain, for instance, the number and value of domestic animals and the value of farm lands, the average of lands, also the different classes. The government in 1904 made an investigation of wealth, debt and taxation. At that time they employed special investigators, special agents, but this year this work was done by the enumerators, and the results are compiled in official reports issued by the United States, in the bulletin on agriculture of Colorado.

(Examined by Mr. Tew:)

Those conclusions of value are those that are made in the ordinary census report concerning the taking of the census of population in

1910 for the government; those are the reports that I desig-
264 nate the census report. I believe the values taken are obtained by questions asked or statements made by the census takers. As I understand it, the census taker goes around and gets the name of each person, then he states the number of acres of land that that person has. The time is limited in which they are allowed to do this. I presume the whole census of the whole country is usually made by a few persons in a very short period of time. I don't know how their pay is determined. The bulletin is not published by the agricultural department, but by the census bureau. The bulletin purports to give actual values, it does not say anything about taxation purposes. Actual values as found by these takers of the census I believe.

(Examination by Mr. Dorsey resumed:)

First taking up the matter of comparison with these census returns, as I cannot remember those figures, I have a few notes here. Most of this is published in the annual report of the Tax Commission, page 164. Those figures are not strictly accurate there, for the reason that the domestic animals reported for Weld County at the time the census was made up, were not given in enclosures, only those on farms. It seems the first bulletin which the census published did not have in it the number of animals in enclosures, but had only those on farms, but those figures are not exactly like what I have here. When the last census bulletin came out it gave the animals in enclosures and that makes a slight variation. In making these comparisons I used simply the total number of cattle in the [country] and the value as given by the census, and then the number and value as given by the assessor for 1910. The number given by the census was 43,502 and the number given by the assessor was 23,640; the value given by the census was $1,360,891, and the value given by the assessor was $297,540; the percentage is, I believe, twenty-one. I mean farm cattle exclusively, as dairy and range cattle. The horses the census gave 28,255 in the county, the assessor gave it 15,664; the census value was $3,205,397; the assessor's value was $632,070, the percentage 19.7. When I give this percentage, that is the percentage of the valuation each time, to the total valuation as given by the census reports.

Mules, census gives 2,342, the assessor 1,444, value given by census $381,124, by assessor $77,210; the percentage is approximately twenty per cent. For swine, the total number given by census is 16,644, by the assessor 4,016; value given by census $148,350, by assessor $19,030, percentage 12.9. The total of all domestic animals in the year 1910, and compared with the census value, the percentage is 20.3 by the assessor; for 1912 it is 19.7.

I have been comparing with the assessment as made for 1910.
265 For 1912 by the census the total number in 1910 was 43,502, by the assessor the number of cattle in 1912 was 18,658; the census value was $1,360,891, the assessor's value was $298,940 in 1912; percentage 21.9 I believe. Horses, census number is 28,255 assessor in 1912 numbers 15,890 value in census 1910

$3,205,397, valuation by assessor in 1912 $545,260; percentage 16, I think. Mules, census number 2,342, by the assessor in 1912 1,498; value in census $381,124, value by assessor $80,340. Swine, census number 16,664 assessor number 1912 2,584; census value $148,350, assessor's value $15,210 in 1912, percentage eleven plus.

The sheep in the census 22,463, and the sheep in 1912, 29,260; the valuation by the census $125,452, by the assessor for 1912 $45,-600; thirty-six per cent. The average on all these different kinds of live stock in the year 1912 on the assessment by the assessor was 19.7 per cent of the census value of domestic animals.

I have no like comparisons between the census returns and the assessor's returns for the year 1911. I have the census returns on these various classes of animals written down here, and I can take the abstract of assessment of Weld County for 1911 and make those comparisons. Cattle, number in census 43,502, number given by assessor 19,364; value in census $1,360,891, by assessor in 1911 $259,500. Horses, number in census 28,255, number by assessor for 1911 15,664; value in census $3,205,397, value by assessor for 1911 $539,370. Mules, number in census 2,342, number by assessor 1,476; value by census $381,124, value by assessor, 1911 $64,400. Swine, number by census 16,664, number by assessor 2,302; value by census $148,350, value by assessor $13,050. Sheep, number by census 22,463, number by assessor 31,441; value given by census $125,452, value [give-] by assessor $49,450.

I took the item in the census which shows value of agricultural lands, then I added together all grazing land and dry farm land and irrigated land, all those lands that look like agricultural, from the assessor's abstract, and compared for the year 1910, and the year 1912. I find that the assessor's value in 1910 was 17.8 per cent of the census value of the farm lands; and for 1912 the assessor's value is 17.9 per cent of the census valuation on agricultural lands.

According to the census return the improved land in farms in Weld County in 1910 was 410,346 acres; the abstract of assessment of Weld County for the year 1910 shows the acerage of farm lands of all classes found and returned by the assessor of Weld
266 County for the year 1910 to be 292,587 acres, that is taking in the dry farm land, natural hay land and irrigated land. From the abstracts of assessment of Weld County for the years 1911 and 1912, apparently for 1911 the irrigated, hay and dry farm land is 287,009 acres, and for 1912 the same items are 301,302 acres.

We had about 300 warranty deeds as recorded in Weld County examined with respect to the consideration contained in them. Mr. Fairall did the work. Our purpose in doing that was, we wanted to find out how the assessments were running. Since the state has attempted to go on the full cash valuation basis for the purpose of taxation according to the new law, it is highly important to the board to know how the assessment for 1913 compares with the assessment for 1912, and therefore we are endeavoring to get these transfers all over the state. The method I have described in re-

spect to transfers in ascertaining or getting some idea of the values of land for that source is the method generally employed. It is the only one, so far as I know, of ascertaining the value of real estate. It has been in use for more than ten years in the states of Minnesota, Wisconsin, Michigan, I believe, and it has been taken up by the newer commissions as they have been established. I know it has been employed in Michigan, Wisconsin, Minnesota, Iowa, Kansas, and is now being employed by those states. I think it was also employed last year by the new commission in South Dakota.

This idea of having a central taxing board with supervisory powers generally over the state's taxation everywhere is somewhat new, quite recent; its development has been rapid in the last decade.

From all the sources of information which the board was able to obtain and from investigations which we made or caused to be made respecting the assessment made by the assessor of Weld County, in my opinion the ratio of the assessed value as found and returned by the county assessor of Weld County for the year 1912 to the total cash value of all of the property in that county subject to assessment by the assessor, if a man estimated it at twenty per cent that would be a conservative estimate; that the assessed value did not exceed twenty per cent of all the property in the county. The effect of that is to reduce the state's revenues. The constitution has provided that the state's levy shall not exceed four mills, except for insurrection,
and the reduction in value in the counties of course cripples
267 the state's revenues. Does not affect the county revenues;
the limit of levy for the county revenues is so high it doesn't matter much; they can lower the assessment, raise the levy, and produce the same ultimate result. The State Board of Tax Commissioners have had occasion since they have been in office, to look into the disposition of the counties of Colorado, including Weld County, to assess the values in the county at a less ratio compared with the full cash value than the State Board. I should say from these indications, compared with others that we have, that Weld County is one the lowest counties. It is not the lowest, but is one of the low counties in valuations of the state. When I say "one of the low counties" I mean as when the assessed valuation is compared with the actual value of the property in the county subject to assessment, applying the same test to all counties. From such investigations as I have made it remains the conclusion that Weld County shows about the same in 1910, 1911 and 1912. The Board has several conferences on the question with the assessor of Weld County, and also with the Board of County Commissioners in the spring of 1913. I think we did not have any conference with Mr. Fischer; we began in May and his term expired in December of the same year. The assessment was practically made when we came into office. I know nothing further than what I heard in the testimony here yesterday of what happened in that respect between the State Board of Equalization and Mr. Fischer or other county officers of Weld County prior to the organization of our Board.

Cross-examination.

By Mr. Tew:

The Tax Commission commenced sessions immediately May 20, 1912, when it was appointed, and was in continuous session until about the fifteenth of June, when the assessments were certified out, and the assessment was made some time in that period, I couldn't say just when. We went into office May 20, 1912, and from that time until June 15th the board was engaged each day. We had both hearings and assessments. The Board was not appointed until late, and hence the hearings were carried out in a very short space. We were rushed in making this assessment of the Union Pacific in the year 1912; we had a more limited time than we had this year. We adopted the assessment that had been made by the Board of Equalization. When we made the assessment the board figured the stocks and bonds and earnings enough to assure themselves that the assessment made by the old Board was approximately correct, and then certified it out.

268 I don't think we considered physical valuations in our computation. I should say we excluded those from the method of calculation. I think we excluded physical valuation from our method of deduction when making our assessment of the U. P. in 1913 also. The physical valuation is of not much value in arriving at a conclusion as to the values of a railroad property. Speaking for myself I so regarded it in 1912 but I would not say that the Board had definitely agreed to exclude it, but so far as conclusions were concerned the board regarded it of little or no value in a good going railroad like this one. The reason for that is that the railroad has vast intangible values. I think these intangible values are values that pertain to the railroad as an entity, and attach to it everywhere. I think that peculiar thing might be described as good will.

Our method of figuring on a good going concern, railroad, is by using the stocks and bonds and earnings. I think I am acquainted with the stock and bond method. I believe that is the method that is described in what is called the Bent County Case, Bent County against A. T. & S. F. I could hardly say that is the best method; there is a dispute in the authorities. It is a very good method. I would say that. I believe our duty as a valuer of railroads was to obtain the value as declared by Section 106 of the Revenue Bill of Colorado. I believe if we followed that section, we as a Board shall tax all the values that pertain to the property of this corporation. I understand that we are to find the value of the whole plant, divide that into miles and apportion the total value as the mileage of Colorado bears to the whole mileage of the system. I think this method is the general complaint of every one who appears before us. I do recall that Mr. Scribner, for the Union Pacific, appeared before the Board and filed a brief in which there is a contention against this method of valuation. I do not remember that it was stated to us by Mr. Scribner, in substance, that if we did tax those valuations and did operate under section 106, that they would oppose the collection of the tax by litigation. I couldn't say that was said. I couldn't

say it was in our mind that that would be the case. I know there was more or less talk if we got these railroads higher in proportion than the other companies that there would be litigation, but whether it was said if we followed that method strictly there would be a suit, I don't remember. It may have been, but I have no recollection of that.

Assuming that the statement Exhibit A gave the average market value of Union Pacific preferred and common correctly and the total amount of that value correctly, and that it also con-
269 tained the proper value of these deductions, and that these deductions are rightly valued, and that the result, after subtracting [dedu-tions] from the amount found was correctly figured, then in order to find the true value of that road by the stock and bond method, all that would need to be done would be to divide that remainder by the number of operated miles of road. The result would be the amount per mile that that railroad ought to be assessed under the laws of Colorado by the Tax Commission, by using the stock and bond method. The stock and bond method is a very good method; I wouldn't say it is the best method.

I would say that in making our assessment we were as thorough in that as we were in the other matters up in Greeley. I went over this with more or less interest, because it was the first time I was on the Commission, and this we checked up. Some of this we could not verify (referring to book); that is, we have to depend on the returns to us.

If the water-line property is separately assessed, it should be deducted. If the property is part of the system and made the system more valuable, there is no reason to deduct it if it is not assessed elsewhere. I should think that sixty-seven million dollars demand loans and cash would be [as-essed] elsewhere. I don't know whether it is. I did ask Mr. Scribner. I understood him to say it was.

So far as I know those deductioss were accepted as they are made there; we, however, checked as much as we could. I believe the average value of one seventy-three of the common stock in 1911 was checked up; as I remember that was correct. Certainly if the figures are not correct then an error crept into our assessment. The ninety-one price Union Pacific preferred were checked up.

I believe we considered the earnings in Colorado only, as one of the methods of concluding the value of railroads. Perhaps, taking the system as a unit would be the better method of obtaining it. Yes sir, if we don't do it, there is a way to arrive at the value of a mile in Colorado by its earnings; the earnings in Colorado are given there. I don't know that that schedule is capable of being used as a method of deception. It is perhaps not absolutely as accurate as obtaining the net earnings of the system by the mileage of the whole system, but a satisfactory degree of accuracy. I think is reached in that way. As I understand it, a railroad has no right to keep any accounts other than such as are prescribed by the Interstate
270 Commerce Commission, and therefore it has seemed to the Commission that the statement of earnings in Colorado is reliable.

The earnings and number of miles of the whole system are given there. If the total earnings is used and take from it the total expenses of operation of the railroad, as given in Exhibit A, the average value of a mile of the Union Pacific system, I think it would increase the assessment in Colorado about thirty-three and one-third per cent.

If we take the statement made by the Union Pacific, which is Exhibit A in this case, and from the statements therein made valued the road on an earnings basis, taking the entire [*er*anings] of the whole road, and taking from it its entire operating expenses, and that was the rightful basis, I would say that the assessment should have been higher per mile than 13,183.

In this method of calculation of value, we have assumed some percentage of income that the road ought to have that ought to be accorded to the railroad value-percentage of earnings on the amount invested. This method is sometimes called capitalization of earnings or income. We take the total miles of a railroad and the total earnings of all those miles and the total expense, deduct the expense from the earnings and divide the result by the number of active miles to obtain the value per mile of earnings. Then we choose the percentage we assume the railroad should make on the investment and divided that earnings per mile by that percentage and multiply by one hundred to get the valuation. I think eight per cent is what we took in this case; that was just an arbitrary figure agreed upon by the Board. I don't think the farm lands in Weld County would return year in and year out eight per cent on three times the valuation that was returned up there in that year. I should say we did not employ a method more liberal in capitalization of the incomes to determine the value of the road than employed in regard to farm lands, because the farm land values are not the average return. There are other values. I don't see how you can compare farm lands with railroads as to capitalization. I should not say that that capitalization method of using so large a percentage as eight per cent is larger than is generally used in this particular section of the country. I know that in the eastern state-
they use a smaller [figures,] and I have heard that in Oregon they
use a lower figure, but they capitalize there by taking out the
271 taxes. The figure that we used is to be used in dividing the
net operating revenue. We did not give the road credit for taxes in capitalizing. The reason for this is that values are less settled in this state.

If we use eight per cent of the earnings of the whole road as the divisor, the value of the road would be greater than we have fixed it. I cannot say how much; I have not computed that.

The physical valuation of property is not a very reliable basis for taxation in the case of a railroad doing a good business. Applied to the Union Pacific, from what I know of it, in view of this report Exhibit A, I don't know whether it would be a very deceptive basis upon which to depend to obtain the true value of any mile of the Union Pacific Railroad. There might be a mile in the midst of a big state where it would be all right, but generally speaking it would

not. That is true because the Union Pacific Railroad Company is a very successfully operated company; its railroad is a very valuable property as compared with other roads of the country, I think so. I understand it owns in addition to its own property stocks in a large number of trunk lines of the United States, and has an investment of two or three hundred million dollars in such stocks and bonds. It would look as though that is pretty conclusive proof that the physical valuation of the property of the Union Pacific would be unreliable in obtaining the true average value per mile of the railroad, but whether absolutely unreliable, I don't know as I should say that. I should not think at present as it is doing business now it would not be properly taxed if we alone valued it according to the physical valuation.

DANIEL A. CAMFIELD, a witness on behalf of complainant testified as follows:

Direct examination.

By Mr. Dorsey:

My name is Daniel A. Camfield. I reside in Greeley, Colorado. I have resided in Colorado in Weld County, thirty-five years. My business since I have resided in Weld County has been farming, stock raising, and ditch building, principal business. My main business at present is construction of ditches and reservoirs. I am a property owner in Weld County; the largest taxpayer in the County, I think. My property in Weld County consists of lands and improved property in Greeley. I am the largest stockholder in the City National Bank of Greeley. I also own a hotel in Greeley. I own a business block in Greeley and am interested in one or two others.

272 I am president of the company that has the contract for the construction of works which are to supply water for the irrigation of lands in the Greeley-Poudre Irrigation District, and have been more or less connected with the construction work that is going on there, in Weld County.

From my experience in Weld County and the business in which I have been engaged, I have become familiar with the value of irrigated lands and water rights and with the conditions respecting the development of water and the quantity of water rights in the country. I think in the year 1912 the acreage of irrigated land or irrigable land in Weld County was in the neighborhood of three hundred thousand acres. That was approximately the acreage that existed in 1911 and 1910. There has not to any large extent been any material change between 1910 and 1912.

In 1912, exclusive of the water properties to be developed for the Greeley-Poudre District, there was water sufficient approximately to irrigate three hundred thousand acres.

In 1912 I think the average market value of these three hundred thousand acres of land, including water, improvements and land, would list one hundred dollars an acre. The value of the water,

including the reservoir rights, run all the way from thirty to eighty dollars per acre; an average value, I should say, about forty-five dollars per acre. I think the lands are worth less in 1910 than in 1912, that is taking the land and water together, I don't think there was very much difference in the value of the water.

There are one hundred and twenty-five thousand acres embraced in the Greely-Poudre Irrigation District. Part of that is government land which has not yet passed into private ownership. About ninety thousand acres of that land is in private ownership; that is in addition to the three hundred thousand acres that I spoke of a little while ago. Practically all of that ninety thousand acres is located in Weld County; yes, all in Weld County. I think that ninety thousand acres of deeded land in the Greeley-Poudre District in 1912 had an average value of thirty dollars an acre, exclusive of the district bonds at that time outstanding to the extent of twenty-five dollars an acre. The market value of that land would be thirty dollars, the purchaser to assume the bonded indebtedness, or take it subject to the outstanding bonds; including the bonded indebtedness of twenty-five dollars per acre would make an average gross value of about fifty-five dollars including the ditches, reservoirs and the property those bonds have bought.

273 I think there has been no increase in the population of Weld County, taken as a whole, since 1910, when the census was taken.

I am now actively engaged in arranging for the completion of the Greeley-Poudre project, and think those words will [undoubt-ly] be completed in the next eighteen months.

I think there was more live stock in Weld County in 1912 than there was in 1910, especially a large increase in dairy cows.

I think the average deposits in banks for the year ending March 20, 1912, is higher than in March of 1911, and lower in March, 1910.

The local public utilities in Weld county, particularly in Greeley, in 1912, were the city water works, the Home Gas and Electric Light Company, the Greeley Gas and Fuel Company, the Denver and Greeley Interurban Company, and in Eaton the Eaton Electric Light Company. There is also another electric light company at Lupton. The Eaton Electric Light Company was in approximately the same condition in 1912 as in 1913; slight increase in mileage of wires. The Greeley and Denver Railroad Company is exactly the same. Its property consists of four or five miles of track in the city of Greeley and the equipment that goes with it; street railroad entirely. The system and property of the Greeley Gas Company is approximately the same in 1912 and 1913; slight increase in pipes laid. The property and business of the Home Gas and Electric Company in 1912 and 1913, almost identically the same. I am one of the largest stockholders in the Home Gas and Electric Company. My estimate would be that about twenty per cent of the deposits in banks in Weld County were deposits of public funds.

Cross-examination.

By Mr. Tew:

For the past five or six years I have spent a good deal of time in Denver and elsewhere away from Weld County. I am at home in Greeley but a small per cent of the time, perhaps every week for a little time. For the past two or three years I have spent more time in Denver than in Greeley.

In my approximation of three hundred thousand acres of irrigated land in Weld County I meant land under cultivation, I calculated from an estimation of the total area and from hearsay also.

The Larimer and Weld Canal is one of the largest ditches.

274 I should say there is about forty thousand acres of irrigated land lying under the Larimer and Weld Canal. That is the Eaton Ditch. That is the largest ditch, I guess, in the county. The No. 2 serves practically the same area. I think it has forty thousand acres. I think there is an excess of thirty thousand acres of the forty thousand acres of land under the Larimer and Weld Canal that is in Weld County.

I don't know how many acres under the Bucker Ditch. The Meadow Island is in that neighborhood, on the west side of the river. I know where the Fulton Ditch comes out approximately; probably comes above this side of Brighton. I have been across the lands under the Fulton a good many times, in various ways. No, I haven't been on the lands that were under the ditch to make an inspection. I do not know how many acres are under the Home supply in Weld County; it comes out of the Thompson. I do not know definitely how many acres under Handy.

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I make my conclusion as to this irrigated area from a document that is an actual fact. Yes, I got a document that was purported to me to be an actual fact and from that state these number of acres. That includes each farm that is irrigated entire. It is the county assessor's figures with my own deductions from that. Yes, I give you my conclusions, which are about three hundred thousand acres There are some acres, as a general thing, not servable, which I took into consideration. I know the assessor took that into consideration. No, I did not talk with the assessor directly. I placed the value on three hundred thousand acres outside of what is now taxed. I understand rights of way for roads and ditches running through the land are not assessed. As to that I don't know anything from any conversation directly with the assessor, but of official source; Greeley Commercial Club Secretary. They never represented to be anything like extensive irrigated area and high values of property in Weld County to introduce immigration and upbuilding of the community. That is the purpose of all commercial clubs to benefit the vicinity where they are in. To a certain extent I keep in touch with those clubs in my business. I am not engaged particularly in the boosting

business. I helped to construct the Greeley-Poudre Irrigation works and raise the money to build it.

In fixing an average value for all the irrigated acres I meant not only the acres that are fitted for irrigation, but in cultivation. I didn't mean to count in that a single acre of land that was
275 above the ditch. I didn't mean to count any particular taxpayer's land that was seeped. Yes, there are many thousands of acres in that county. They are scattered through part of the three hundred thousand acres. They are in that county. I think there is three hundred thousand acres in crop. This seeped land extends more or less through the irrigated area of Weld County; and the non-irrigable spots extend throughout the same. And the spots which are not served that are irrigable are scattered throughout the territory. On certain ditches the condition prevails that lands under ditches capable of service are not entirely watered; not hardly to the extent of forty or fifty acres in a quarter section. Under new ditches that condition prevails on a number of farms between Denver and Greeley, along the Union Pacific; under the Farmers Independent, because they have not the water supply. In very few instances, because some of these ditches haven't sufficient water supply to serve the whole area, and an owner of a water right, although theoretically it is enough for one hundred and sixty, must bring it down to a service of a less area. That may be the prevailing condition under one or two small ditches. That same condition prevails to some extent under the Bucker.

Q. Prevails under the English Ditch or so-called Evans No. 2?
A. But it does not prevail under the Eaton.

It does prevail under very few of the ditches. To a certain extent it prevails under those you have mentioned. Certain lands under the Meadow Island and Brantner that haven't all been watered—new land never all watered. I think it is only in a few instances. I don't know of any where a man has all the water for a hundred and sixty and can only water forty acres. I don't know of a solitary instance of that kind. There might be a few such instances under the farmers, where he bought water for a hundred and sixty and——

Yes, my acquaintance is casual with the lands under the Farmers. Never had any business to transact under the Farmers. Never had any business in any way under the Evans No. 2; nor the Brantner nor the Lupton Bottom; nor nine-tenths of the ditches in Weld County. Of nearly all the ditches that is true. That condition does not prevail where I have knowledge of it.

I think the values in 1912 of lands in Weld County were less in 1912 than in 1910. I think that is true of values of lands and city property generally throughout the state. I think the values of Weld County property were really lower in 1912 than in 1909, 1908 and 1910.

276 One of the principal businesses of the richer lands in Weld County has been the culture of potatoes in the vicinity of Greeley. Very injurious diseases to the potato plant became prevalent over the entire crop of potatoes in that valley in 1911. It made the crop practically a total failure. In 1911 about thirty-

six thousand acres were planted to potatoes. I think in that year if the average yield of potatoes had been good from these lands there should have been a return of about ten thousand cars. I think the whole crop yielded between five hundred and a thousand cars. The potato business is one of the profitable businesses to which those potato lands are devoted. That disease was general throughout the whole Greeley district. I think the prevalence of that disease caused a decline in those lands to some extent. In 1912 the potato crop was cut down to about twenty thousand acres. That crop was a partial failure. There were hundreds of car loads that were not shipped on account of the price but Fed to live stock. Those were not necessarily injured potatoes from blight; I don't think that was the fact; The potatoes that were raised were rather inferior to some. Some crops were up to standard and others were nearly failures. The blight caused the failure. There are about seven thousand acres planted to potatoes in 1913. The blight was due three weeks ago; scarcely any on them now; the last I heard was day before yesterday, Tuesday night; have heard scarcely any complaint at all.

That ruin to the potato crop or potato business had a great deal to do with the downward trend of values of lands. That certainly had a depressing influence upon conditions in the city of Greeley. I think Greeley is smaller in population this year than it was in 1910; a few people less there perhaps. I think the same is true of Fort Collins where they do not raise potatoes. In most of the towns in Northern Colorado there has been a decline of population and of business values. Ault has declined. Ault is in what is termed the fertile or valuable land district of Weld County; under the Larimer County ditch. I don't think it has decreased half; it has decreased much. And business values have declined in about the proportion to the decline of population; the same thing is true in the City of Denver. There has been some decline at Eaton, but nothing near as marked as at Ault. That condition prevails at Pierce and at Nun to a much greater extent for another reason, none of which are on account of the potato crop.

In my estimation of values, I give my estimation of values of lands in Weld County at the present time, under present conditions. Certainly, I took into consideration all the circumstances, what crops will grow, what the crops will produce, what the market
277 value is, cost of production. No, I would not be guided alone by some freak sale that a person might make; that would be a very misguiding thing. I would not be guided alone by the selling price of the land. I would take into consideration all of the surrounding circumstances in making the values.

I would think the number of sales of lands in the years 1908, 1909 and 1910 were more than in 1911 and 1912 in that community. I have not looked the matter up, but that would be my opinion. It is also true that in 1912 not only did the prices decline, but the number of sales was less. There are not as many sales at present, very few as to farm lands. If a person was called upon

within a period of months to fix a value there, he would have to depend upon no sales made during those months.

The lands in the Greeley-Poudre Irrigation district are still in what we call a virgin state, practically, except for some dry farming.

When ruin comes to the potato crop, I think it entails a loss upon the farmer of fifteen or twenty dollars an acre. That is the loss of the use of the land that year and the cash outlay in raising the crop; and there is no remnant of value that could be used for anything. I think that had an effect toward making a great many farmers in that community borrow money. That was true more in 1911 than in 1912. It recurred in 1912; not to such great extent. It had a more discouraging effect [that] the first year. I think that in turn made the merchants who carry the farmers borrow money themselves.

In the confines of the Greeley-Poudre Irrigation District there are 125,000 acres. It is the purpose of the projectors to serve that number of acres with water. The district has voted bonds to be paid to my company in the sum of five million dollars; the total issue was $5,100,000. The extent to which the irrigation works extend would not exceed one hundred miles. That includes the taking of water from the Laramie river, outside of the Poudre Valley; take the waters from that stream through collection ditches, through channels into the pipe. The right to take that water by this district is in litigation, yes. If the suit should be decided in favor of the district, then the lands would be burdened with about forty dollars of bonds per acre $40.80. There are ninety thousand acres of deeded land in the district. That is all that is subject to taxation by the state authorities, but the rest is under contract to come in; can not get title to the lands until they are in the district.

278 If you count those ninety thousand acres, the bond burden is now about twenty-seven or twenty-eight dollars an acre of the bonds outstanding.

Of the five million dollars of bonds there has been expended by the district to my company in furtherance of the work $2,340,000. The bonds outstanding are in the neighborhood of $2,700,000. That ninety thousand acres is burdened for less than two million. Those lands in the district are largely range lands. If not irrigated those lands are not of sufficient value to sustain a bond burden of thirty dollars; but they are going to be irrigated.

The company that is building this is the Laramie Poudre Reservoir and Irrigation Company. It has not done any work on these works for about a year. The works are not all completed on the Laramie River side; not finished on the Poudre River side not finished anywhere. To finish that will take in cash upwards of a million and a quarter. My company is in process of getting it. I don't know as it is in the process of being declared a bankrupt; there was a charge made, but they would not push it at all.

Under the contract between my company and the district the interest coupons that were carried during the time the work was going on were to have been paid. They have defaulted in interest, no such amount as six or seven hundred thousand dollars; I would

say there were outstanding about one year's interest coupons on $2,610,000 worth of bonds, may be a few scattered ones more. Practically all coupons were paid up to and including June 1, 1912, June 1, 1913 would be one year's default interest. I think they will default on December 1, 1913, unless there is an agreement to the contrary. Unless the works are completed the lands that are in them now have not as much value as the bond burden on them; but I don't think the works will be left unfinished. To give the lands the full value, they should have the water supply from the Laramie river in conjunction with their other water supply. It was contemplated when the lands were to be burdened with $40.80 per acre that they should have the Laramie River water for redemption and reclamation. Without it they have sufficient water supply for that number of acres.

The district is suing the company on the bond; it is contrary to your advice. Their theory is that they would complete the works according to the contract.

As to the method of rehabilitating the enterprise, two different plans have been put forth that did not avail anything. All of them are now off, and my company is hoping to get a new one. I
279 believe that this one will be successful. Under this plan there is in contemplation issuing five hundred thousand bonds to pay interest. If the lands are to remain like they are now, they never could pay this bond burden that is on them. They were in the same condition as now in 1912, all the way through.

There is one part of this work called the Poudre Valley ditch. It is bonded again with bonds underlying these bonds for $125,000. That ditch and reservoir is separate property. If that is taken away they would have to build more works to carry water from the Poudre river. The ditch as it stands has cost some six hundred thousand dollars, but it would not cost six hundred thousand dollars to enlarge it for the district purposes. The ditch would have to be enlarged to carry the water. There is some default bonds and coupons, yes sir. The Greeley-Poudre work has nothing to do with this. The Greeley-Poudre under the contract was to get the majority of the stock in that ditch at the termination of the contract, as it is the means of conveyance of water from the Poudre River to the district. I don't know that if the mortgage be foreclosed the district will lose the share that it had in that ditch; you say not; your advice was different. If it owns it it would have to pay maintenance charge, according to your advice.

The district had some water rights on the Laramie River that it was purchasing from my company so as to get some of this water, if it ever does get the work completed. Some mortgages on some of this. One of them has been foreclosed. I think the district has got the water. Mortgage on it, I know, but we deeded the lands back to you and all the water, subject to the mortgage.

There is also outstanding of my company bonds on these water works and ditches and lands over there on the Laramie River of about $188,000. Some of the interest coupons on those bonds are defaulted. In the face of these conditions, I think the works will

all be completed within eighteen months except the reservoir; I think that will be inside of two years. It is true that if it is there must be a new plan agreed upon between my company and some other company in this district to carry it out.

The lands in that district are similar to a certain portion of Weld County. They are grazing lands, except what is dry farming; that is all there is in cultivation at the present time.

280 I should say the value of the hotel which I own called The Camfield in 1912 was about fifty-five thousand dollars, under all the conditions at that time or the present time, there is no material change. No, I could get no ready sale for it now; that is true of most properties. I don't remember the amount of the assessment in 1912, I think I paid about eighteen hundred dollars taxes on it, based on a one-third valuation.

I own the building across the street called the Farmers Trust. That is not all occupied; never has been since it was built. If the town had continued to grow it would have been occupied; but the depression has prevented it. The bank in which I have stock rents a part of it. I am in control of that bank in the way of holding a majority of the stock. The engineer who works for me is in another part; he simply runs it. I put an estimate of value on that building, considering everything, of about forty-five thousand dollars.

The whole property of the Home Gas and Electric Company is worth I think about one hundred thousand dollars. We would be willing to pay that for it.

Some of the lands I have mentioned in Weld County are under irrigation district bonds other than the Greeley-Poudre; some new land; very few old land; but a few in the neighborhood of Denver here. I know the location of the Denver-St. Vrain district. I know it is supplied from a big reservoir out here, but how the water goes to it I don't know, nor where the ditch is. That is the Standley part of it, I understand, was supplying the Church Ditch prior to the building of the reservoir. I think those lands are bonded for about fifty dollars an [acre*s*]. Yes, they only have five-eight-s acre feet of water No, that is not enough. I don't think the amount of the mortgage on a farm has anything to do with its value. If these lands are leased and the bondholders take the lands, the bondholders have got to pay the assessments and taxes just the same as the owner. It is simply a loss of equity and not in the value of the property.

I think the bonds on the lands in the Greeley-Poudre in no manner [*a*ffects] the taxable value of the lands.

I do not know the lands in the Denver-Greeley Valley district very well; I went over them years ago. I think part of them are sandy, practically worthless lands for irrigation. I so heard, that within the last two or three years there was considerable effort made to sell a lot of those lands at very high prices to persons who didn't understand the worth of irrigated lands. The sandy worthless

281 land for irrigation in this Denver-Greeley Valley district in my opinion would be thirty to forty per cent and may be

more. It is true that the number of lands to be served are very small when compared with the whole area that is within the [bound-ries] of the district; and it is true that any conveyance of water coming from Standley Lake must traverse through long [di*d*tances] of sand hills. I think the issue of bonds is about two million dollars. I understand the works are nearly completed this year.

Redirect examination.

By Mr. Dorsey:

I based my estimate of the acreage of three hundred thousand acres of irrigated lands in Weld County in 1912 on knowledge received from the secretary Mr. McCreery, of the Commercial Club, in which he showed me that the assessor assessed as in actual crop 266,000 acres in one year, and 259,000 in another year, and that every acre was taken out, whether it had a house on it, ground occupied by buildings or a knoll on it, or a place that was seeped, or roads, and so forth. In my estimate of three hundred thousand acres I did not include any seeped lands or any land that was not irrigable at all, or any land that was covered by improvements, such as buildings, nor any lands that was within roads or rights of way for ditches. In that three hundred thousand acres I did not include any lands in any of these irrigation districts about which Mr. Tew interrogated me. What I meant by the three hundred thousand acres was that those are farm lands actually irrigated, for which water rights are already had, so they can be used now or could be used in 1912.

I placed a higher figure than the assessor did as the acreage of irrigated lands in 1912 for these reasons: that these deductions, I believe, are much less than as represented by the different land owners. It is only human nature to make these deductions by every farmer and every man as much as he can. It is my opinion that the assessor in making his assessment has deducted from the acreage of irrigated lands too much, that is, that he has deducted acreage that is actual acreage, irrigated or irrigable lands. I have nothing upon which to base that judgment except human nature, which is the natural thing to do.

When Mr. McCreery gave me information upon these subjects he had no knowledge of what I wanted the information for, I simply asked him for some information. I understood that what he gave me were the statistics that had been prepared as showing the actual facts.

282 I understand that the assessor's return for the year 1912, in which he returned the acres of irrigated land as 266,871, was for land in crops under ditch. I think land under a ditch for which the farmer has a water right, even though he does not irrigate it, possesses the value of irrigable land, nearly the same value as the land it does irrigate.

The first potato crop failure in recent years was in 1911. We have had more or less blight every year. Thirty-six thousand I think is

the maximum acreage that has been devoted to potato culture. That land, even if it is not possible any more to raise potatoes on it, is land upon which good crops of all kinds, and sugar beets, can be raised. The sugar beet crop was very profitable in 1912. In a good year with a good price it is not as profitable as the potato crop. Taking an average of ten years and with the price of potatoes last year, the beet crop was equal to the potato crop on an average. The price is set on beets; there is a market for beets. A man knows what he gets for his beets before he plants them. That is not true with respect to potatoes, even when you get a good crop. In 1912 the potato crop was about fifty per cent of what it usually is but it wasn't worth anything. The fact that there was a failure of the potato crop in the year 1911 [reduc*e*d] the value of that thirty-six thousand acres of land, but did not destroy it. It affected all irrigated lands in the potato district.

The population of the towns in Weld County has [dec-eased] since 1910; I think there has been a slight increase in the farming population; I think one nearly offsets the other as a county.

In my cross examination, in estimating the value of land I didn't mean what it would be sold for at auction. In getting at the value I would say what the land would be sold for in a year's time, twenty-five per cent down payment and time on the balance, not a forced sale of land. I am referring to market value when the circumstances are not pressing so a man has to sell at once at auction.

Mr. Tew, who interrogated me on cross examination, is lawyer for the Greeley-Poudre district in the litigation arising over the waters of the Laramie River. In my cross examination when I mentioned something, in addressing him, about "your advice," I meant his advice given in that capacity.

Over two million dollars in cash has been expended in the construction of the works for the irrigation of lands in the Greeley-Poudre district. According to the estimates, about twelve hundred thousand dollars more will be necessary for the completion
283 of the works. So far as the value of the lands is concerned, it does not make much difference whether my company or some other company completes the works. The lands in the Greeley-Poudre district cannot be purchased at grazing land prices.

There are some of the lands in the Henrylin district farmed out there this year and last; they were in 1912. I did not include any of that acreage in my estimate of three hundred thousand. That acreage is in addition to the three hundred thousand that I had in mind. The three hundred thousand I spoke of were under the old ditches.

Witness JOHN BURDEN PHILLIPS, cross-examination by Mr. Tew resumed:

The method we adopted to make that assessment: We took the value of the stocks and bonds of the railroad and apportioned that according to the number of miles of main and second track in Colorado. That determined the stock and bond value of the Union Pacific in Colorado. We then took the net earnings, as reported in

the annual report, in Colorado, capitalized them at eight per cent, added the two numbers together, divided by two and got the average. We get the net earnings per mile of the Union Pacific in Colorado as returned by the Company. I believe we took the statement of Mr. S. Scribner, Exhibit A here.

In making my census valuation of the property in Weld County I have not gone back of the census. The list of comparisons that I gave here on that was made up last September, and I revised the list last week, went over it to see if it was correct.

I think this census report is valuable as an index of the value of these items. It is not the absolute value any more than the assessor's is. They are both approximations, but I think the census is generally accepted as pretty accurate.

Redirect examination.

By Mr. Dorsey:

I think the physical valuation of the property owned by the Union Pacific Railroad Company was not considered by the board as a body in arriving at the assessment of the Union Pacific for the year 1912. It would be considered in exceptional circumstances if the road were running behind, or something of that kind.

284 I believe I said that in making the 1912 assessment of the Union Pacific the board were somewhat hurried and adopted practically, after some checking over, the assessment made for the previous year by the State Board of Equalization. However, the board had in connection with making the assessment for the year 1913 plenty of time to work over the figures of the Union Pacific to arrive at its valuation. That valuation for 1913 is upon a full cash basis instead of a one-third basis. The result which was arrived at in 1913 is approximately three times what the assessment was in 1912. There were only slight changes in mileage and other conditions respecting the Union Pacific between those two years.

We did not act on the complaint made to the Commission in the fall of 1912 calling attention to the assessment in Weld County for that year, for the reason we [hadn't] at that time been able to investigate all the counties in the state where there are railroads, and therefore we decided not to act on the complaint until we knew more about the situation.

The board did in the present year 1913 make assessments of the property of certain public utility corporations located in Weld County which in the year 1912 were assessed by the local county assessor. This statement certified to by the secretary of the Commission, which is the paper marked Exhibit C I believe correctly sets forth the assessments of the properties of these respective public utility corporations as made by the Tax Commission. These figures showing the assessments made by the assessor in 1912 are the figures that the assessor has reported to the Tax Commission on a blank that we send out for that purpose. Whether or not they are correct, I couldn't say, but I believe they are, according to the best information we could get.

(Said Exhibit C was offered in evidence and made a part of this record.)

I believe the Greeley Gas and Fuel Company is not included in that list. We have not yet fixed the assessment for the Greeley Gas and Fuel Company. They [didn't] file their return in time so that we could. With that exception the list covers all the principal public utility corporations in Weld County formerly assessed by the assessor. There may possibly be some irrigation enterprises that would be classed as public utilities, with the ditch running into two counties. So far as we have as yet been able to determine, the assessment as made by our commission and as appears upon Exhibit C is the full cash value of these properties.

285 CELSUS P. LINK, a witness called and sworn on behalf of the complainant, testified as follows:

Direct examination:

My name is Celsus P. Link; at the present time I am a member of the Colorado Tax Commission and have been since May 20, 1912, the date of the first organization of the Commission.

For four years prior to that time I was in the ranch and real estate business; for nine years prior to that was assessor of Park County, and two years prior to that time deputy assessor of the county; four years prior to that was deputy treasurer of Park County. In connection with matters of assessment and taxation in Colorado I have been an official for something over sixteen years, besides serving on a number of tax committees during intervening four years, so my experience has been about twenty years.

I have had occasion to investigate and determine the relation between valuations upon property fixed by county assessors and property of such corporations as railroads fixed by State Board of Equalization, as deputy county treasurer and county treasurer of Park County for eleven years; during that time was a member of State Board of Assessors that served in 1901, and during nine years I was county assessor served on a number of State committees that undertook to get at an estimate of the basis of valuation between the different counties; during the last year have served on State Tax Commission and devoted entire time to figuring valuations of corporations in getting at values of the various counties. My experience was that the assessment fixed by the counties in the 90's up to 1900 was generally higher than the corporate values, but owing to agitation following 1900 corporate values were greatly raised and were maintained. In my opinion local values have not been increased in proportion to real value of local property, so at present time corporate assessments are fully as much and possibly more than local property assessments.

My attention has been directed particularly to Weld county in making these comparisons; my judgment is that the local values in Weld County are much lower than those of Union Pacific and companies assessed by Tax Commission; this practice in valuing has been going on for a considerable period of years; this was true in 1912 and had been for a number of years prior. In 1912 as a member of

State Tax Commission I participated in making valuation for assessment of railroad properties in Colorado, including Union Pacific. We made as thorough investigation of property of Union Pacific as our time permitted. We figured the value from many angles,
286 and had our secretary, Mr. Fairall, formerly secretary of Board of Equalization and who had a good deal of experience, figure up different lines of value on different bases as his knowledge prompted and concluded that assessment of board of Equalization in 1911 was about right, and adopted that assessment practically as ours. The chief elements of value considered were the market value of stocks and bonds and capitalization of the earnings. In all corporations we considered the physical property, but in concerns such as Union Pacific we did not take the physical value as a part; the value we arrived at was in excess of the value of the physical property. We thus arrived at full value according to our ideas and judgment of the entire property in Colorado, and distributed it equally per mile over main line of Union Pacific (line over which trains were operating) in the State, in accordance with the rigid statutory rule.

I also participated in making the valuation of Union Pacific in 1913 for taxing purposes. The basis we adopted in 1912 was to divide by three after having arrived at full cash value; in 1913 we adopted a full cash basis. In 1913 we checked all of the market quotations of the stocks and bonds of Union Pacific carefully for the previous year. We got as best we could the Poor's report and other commercial reports on mileage, and the values of those securities, and ascertained the part in Colorado according to the proportion of first and secondary tracks, and took Colorado's part of the stock and bonds for the part represented by the stocks and bonds. On the capitalization of the earnings we had to rely upon the returns we got from the company. We inquired of the Tax Agent very carefully of the facts in every respect, and after full consideration capitalized the earnings given us upon the Colorado portion. As to average market value of stocks and bonds we investigated for ourselves and took our own figures. As to physical valuations, or what Mr. Scribner called in his report the taxable valuation of the property, I was not and I think the commission was not in any manner guided by that. In 1913 I did not, and I do not believe the Commission did, consider the physical valuations. In 1912 we figured more carefully into the physical valuation, but the figure we got we thought was more than would have been gotten by the physical —. Even in 1912 we did not accept the figures of Mr. Scribner on any physical or actual valuation or what he called taxable valuations, or anything. I think these figures are accurate, although I am not positive: Assessment of Union Pacific in Colorado for 1913 was $23,117,090, or very close to that; assessment for 1912, $7,688,130. Three times the assessment for 1912 would be $52,700 less than assessment for 1913.

287 I believe this to be the full cash value of property of Union Pacific in Colorado. I have made investigation of the assessment as made by the county assessor in Weld County for 1912; I have not made investigations of any other assessment as made in Weld County for any other years so thoroughly as for 1912 and

1913. As to investigations we conducted with respect to the assessments of 1912 and particularly the assessment of 1912 in Weld County: In a general way we went into the matters carefully with the present and former assessor of the county. I have talked with many taxpayers of Weld County. We had a great many transfers taken by this company and other companies. We had several hundred thousand dollars' worth of mortgage values placed by Colorado loan companies there. We were called into the county in 1912 on a complaint of a taxpayer; that occasioned our going into a number of local values in that region; recently we had an agent take the transfer values dated from August, 1912, up to July 1913, in which he took all apparently bona fide transfers, totaling in neighborhood of one and a quarter million dollars in considerations and of the total considerations, he had, by the present assessor and a real estate man of Greeley, verified something over $200,000 worth of transfers. That, besides the general quizzing we always do, are the main points we investigated, outside of census comparisons to which Dr. Phillips testified. We have made a comparison of the assessment values with the census values. As a result of investigations in Weld County respecting assessment made there in 1912, we found, with the exception of only two items that I know of, (sheep appeared to have been assessed at more than one-third value. Town lots and city property according to our recent transfers, appeared to have been assessed about twenty-four per cent) with these two exceptions all our tests showed an average ranging from 17% to 19%.

We knew from the fact of returns that considerable property properly assessable in Weld County in 1912 had been omitted, and took steps to check the omissions, instructing the assessors to fully comply with the law in compelling the swearing to the tax schedules by the taxpayer; and with these methods and some data, besides the census, we got data that the taxpayers were omitting their share of proper returns, especially on live stock and merchandise and automobiles and bank deposits, moneys and credits and unsecured notes, clocks and watches—[personalty] and of that nature. As I remember there was $17,000 or $18,000 assessed on bank deposits on a third basis, which would mean three times that amount on full
288 value, which would be, of course, comparatively small for the size and population of the county. According to the report of the state auditor for biennial period of 1909 and 1910, containing the abstracts of assessments for Weld county, there were no bank deposits whatever reported in 1910; according to report for 1911 and 1912, total bank deposits returned in 1911 were $17,750. The other items I referred to particularly were clocks and watches, automobiles, live stock, money and credits, book accounts and unsecured notes, which generally came under the general caption. In 1909, $52,430 was assessed in Weld County for moneys, credits, book accounts and other accounts not evidenced by writing; in 1910 return on same was $54,270. In 1910 there was no return for bonds, promissory notes, debentures and all other written evidences of indebtedness; in 1910 there were assessed 203 clocks and watches at a value of $2,240. In 1911 there were 125 watches and clocks assessed, total value, $1,100; amounts of money, credits, book accounts and other accounts not evi-

denced by writing, nothing; promissory notes, notes, debentures and all other written evidences of indebtedness, nothing.

I have looked into conditions in various counties in Colorado as to proportion of property assessed and rate of valuation. Weld County compares lower than most all of the counties. In conversation I heard the assessor say, in effect, that he was placing lower values in order that Weld County might be protected from paying too much state tax; secondly, that it might not be made to pay a greater percentage of tax than the corporations assessed by the state board; thirdly, that he had not been provided sufficient help in his county to do the work of the office properly. This assessor was Mr. Fischer, with whom I had several talks in 1912. I have talked some with the present assessor, Mr. Mumper. In the fall of 1912 before he was elected he came in to get advice and judgment on work in the office he was seeking, and since his election and qualification we have had a great many talks and consultations with him.

Since I have been a member of the Tax Commission, we have attempted by every method provided for, to get the assessor of Weld County to raise the valuations, except by a rigid enforcement of the penalty laws. Such efforts were made with Mr. Fischer in 1912, and on those occasions I had conversations with him that I spoke about. The conversation to the effect that he had been supplied with adequate force to do the work occurred in 1912, when we were going into the affairs of the county; he was explaining and admitting that his records were in very bad shape and said that the county
289 commissioners had absolutely refused his many applications to give him sufficient help. As to his assessment for 1912 not being sufficient or complete, he sa-d he had not had sufficient help to do the work properly. I called his attention to the fact that apparently property had been omitted which ought to have been assessed, and he argued the same excuse. I am not sure he admitted that there was assessable property in the county that he had not assessed, but he offered this excuse.

As assessors we have always regarded the census returns as one of the very best methods of testing values and numbers of live stock. In connection with investigations in regard to real estate transfers, between a fifth and a sixth of them were verified. In no single instance in Weld County where we attempted to verify the consideration was it found that the true consideration [hadn't] been stated in the deed, because we had our assistant, Mr. Fairall, verify there, and he only made record of what he found to be correct. In the case of verified transfers only, we did not segregate the lands from the lots. Taken altogether, the relations of the assessed valuation to the actual consideration was 18.8%. As to unverified transfers, the average was 17.9 for the entire million and a quarter, that is, the assessed valuation was 17.9% of the value as shown by the consideration in the deeds.

Cross-examination:

The method we adopted in regard to the assessment in 1912 of the property of Union Pacific in Colorado was this; We first, through

financial journals—Poor's Manual and other sources, got all the information we could as to the market value of the stocks and bonds of the company and the mileage of the company. Our investigations related to market values through the previous year. We then took the official returns of the company and checked them up carefully and took their statement for their earnings. We made a total or unit value of the company on stocks and bonds and got Colorado's proportion on a mileage.

This method of calculation is called the stock-and-bonds method basis. We took the average value of 1911 of all the stocks and bonds outstanding of the Union Pacific System and made deductions from the total. Before we made deductions we found the average value of the common stock. I do not recall what we found it to be, but generally speaking my impression is that our deductions on the market value of stocks and bonds were about the same as those
290 returned by the company. We did not make all the deductions that the railroad called on us to make. I cannot say specifically what deductions we accepted, but we had repeated conferences with the representatives of the company, and they thought we ought to have made more deductions than we did, and thought we should have taken other methods than we took to arrive at the value. After that we took the deductions we found in total from the total of value of the stocks and bonds, and divided that by the total number of miles of the system, main and second track. We did not have the return—our statute seems to be confusing. It says total miles—that we shall take the total miles physical valuations; then in compelling the company to make its return it does not compel it to make return for sidetrack and switches, yardage and things of that kind. We took the unit value of the road, then we deducted the property outside of the state that we thought was not used in the operation of the road. We added first the total value of all the stock and bonds of the Union Pacific outstanding; then we made a considerable deduction before we divided; whether we deducted the total amount of stocks and bonds the road owns, I do not recall. We checked the market value of stocks and bonds that we deducted, but were not enabled to check fully. I do not recall the names of those stocks and bonds in the list deducted. We went chiefly by the list and prices named in the schedule. We did not make the exact deductions asked by Mr. Scribner, but they were chiefly the deductions he asked. We kept no minutes, but figured the road from many different angles.

We divided the net value of the whole system by the number of the miles as stated in the schedule. The amount we obtained by that division was in excess of $39,000 a mile, but I am pretty sure not in excess of $50,000. My recollection is that we divided by almost 8,000 miles, but I may be mistaken. If we had divided by 6,678.29 or 7,084.52 the average value per mile would have been very much in excess of what we obtained; whether it would have been about $60,000 a mile, I can not say, as we did not figure it that way, but only followed the one way. That is about all I can recall as to the method we employed so far as it concerns the stocks and bonds method of valuation. As to whether this

was the method prescribed in the statute, there is a grave doubt about our construction of the statute, and a great difference of opinion on the construction of the statute. As to the construction of the statute in a large measure depends the result we obtain. We did not follow strictly the provisions of section 106 concerning the valuation by the stock and bonds method; I am not perfectly familiar with it. The
members of the board knew and considered this provision
291 when we made that valuation on the stock and bond method. I feel sure they all knew from conversations like that relating to Fischer, and so forth, and meetings of the board, that we were deviating on a stock and bond method from the provision of section 106; I was right there with them. This grave doubt was as to the particular in which we should use the number of active miles of 6,678, assuming that to be it, or 7,084.52, or [ab-ut] eight thousand miles. The figure on Exhibit A just gives the average miles operated, which we did not use; I am not positive, but I think the figure used was 7,800 or 7,900.

Another part of the method employed was the method known as the earnings, or capitalization of earnings, which is the determination of the total earnings, a deduction of the operating expenses (not including taxes or interest), and the division of this remainder by the active miles of the road, which gives the net earnings per mile; we then divide by some percentage supposed to be a proper interest rate and multiply the result by one hundred. We did not make our assessment upon the basis of applying that method to the whole system; we figured that way; we employed the earnings method, but not in that manner. It is a seriously mooted question whether the true definition of the method is to take the whole system and then the whole active miles as the divisor and capitalize; we think that is not the only way to get accuracy out of the method; I think that is the greatest accuracy as applied to the system in getting the rate per mile of the entire system. If we had the earnings right of the total mileage of the state, then by simple division we would come to a more rightful conclusion of the value of the plant in the state; there is no such method as obtaining the earnings of the total mileage in the state by dividing as prescribed in section 106; we did not, in the method of earnings we employed, follow 106. We took the statement made by Mr. Scribner in Exhibit A as to what was the earnings per mile in Colorado on the part of the road in Colorado and from that we capitalized; it is true that taking that method makes a very great variance in favor of the railroad than to take the method of valuation of the system; I think the method of taking the whole system into consideration is not the most common wherever the earnings method is used. I do not think Mr. Scribner assumed the attitude of urging us to do or not to do anything, but he has argued very strongly that it was not fair to take the system earnings for this state. I agreed with him on the earnings, but not on the stocks and bonds. I have stated that I thought the valuation of the road in 1913 was believed to be the full cash
value of the property. This belief is obtained by a method of
292 calculation and deduction which is, I think, different from the statutory prescribed method as applied to the sole method

of earnings limited to the Colorado mileage, but not different on stocks and bonds. When I said I thought the road was rightly valued I did not mean solely on the earnings basis; we used two tests. I think I said I had to use the earnings test to show that I believed the road is rightly valued per mile in Weld County and I have carried with that also the Scribner declaration in Exhibit A as to the net earnings per mile; I do not know what the earnings are other than what Mr. Scribner says; we had no way of checking that. If the earnings are lower than they should be, the railroad has been undervalued; assuming that Mr. Scribner has given us right the net earnings in Colorado per mile, the railroad has been rightly valued. Assuming that we count the average value per mile on the whole system it is undervalued by the earnings method; I do not know that it would be if you take the physical valuation. In these methods of taxation the physical valuation is practically considered worthless alone as a guide, by me personally, and I think by our commission, although a good many of the authorities think it is a competent element. The physical valuation being of no worth as a conclusive guide, we are driven to one or both of the two other methods—stocks and bonds and the earnings. The weakness of the physical valuation method is that it fails to include those intangible rights which are said to prevail with every mile of the road that must be estimated only; they are said to be the rights to conduct and carry on interstate commerce; those rights reach out of Colorado as pertain to the Union Pacific system, and the mileage of Colorado has an added value because of every branch of this system that reaches out to the different points carrying freight and passengers. As I understand it, section 106 directs our commission to so assess that the owner of the corporate entity pays its just portion of taxation upon that value. According to section 106, the only method of ascertaining that value is by the consideration of the whole system in any method—stocks and bonds or earnings; that section commands the method, save and except our constitutional requirement to assess property in our jurisdiction. If we consider all the value of the Union Pacific of its railroad, its good-will, interstate connections and extensions, and profit-producing parts entire, I do not think the railroad has been underassessed; but I do think it has been underassessed if we follow the command of the Colorado law. My attitude is I do not know what the laws of the state are, but assuming that to be as 106 prescribes, if we had followed it, the railroad would have been overassessed. We never thought of protecting
293 the company at all. We undertook to reach a fair value of the property in the state, following the statute and laws as advised by numerous counsel. Mr. Scribner took the position that we could not do what is called importing values. We propounded these questions to the attorney general but owing to the rush in his office he could not give us his opinion, which we always tried to follow, until we had been compelled to certify our 1913 assessment. In his opinion he commanded us to assess according to the statute, which unless there is a court decision in the meantime, we probably will do next year. This will raise the assessment per mile of the

Union Pacific if the market values and earnings are the same at all. (This ordered stricken. Repeated in substance to substantially the same question. The Court: "It may become the duty of this court to protect it against that if it should decide that the attorney general is wrong, so that don't help us a particle."

The method we used to obtain the average value of all the classes of stock considered in making our determination of value under the stock and bound method was to take the quotations of the different classes of securities during twelve or fifteen day periods of the preceding year and average them. I heard the testimony of Mr. Scribner that he averaged two days the high and the low, two prices; we took different months also; we figured in different ways to try and be sure we were about fair on the average. We asked questions of Mr. Scribner or other representatives who [where] there endeavoring to influence us to righteousness in regard to these deductions; there were questions asked of Mr. Scribner as to the $67,000,000 cash item from the deduction; he [tolds] us about where it was; he explained in a general way; I thought he was more specific when he touched on these water line properties of $4,000,000 also. As to other item of advances for construction of new lines, he explained that their accounting department had set aside those amounts and therefore they ought to be deducted. We had gone into the deductions a good deal and not to our satisfaction. It has been one account we have not been able to fully satisfy ourselves on.

As to inquiries made as to valuations of Weld County property locally assessed upon which I based my conclusion here as value I in person inspected some but not all. I should guess about thirty properties were put in the list of verified properties to go in the list. Personally I have inquired considerably into the values among owners and sellers of property. These verified transfers were taken by Mr. Fairall. Those values were verified by Mr. Fairall from the present assessor, Mr. Mumper, and a real estate man in
294 Greeley, a dealer, I think. I did not have any personal inspection of these properties or personal knowledge of amount paid; I did not see the deeds or amounts of consideration; I know pretty well from the report of our agent how they were selected and out of how many deeds. I do not think he saw the property, he saw some records at the court house; all I know he did is what he told me; I do not know whether he interviewed the parties who made the sales; I do not know whether the consideration was represented by trades, only what he told me; we did not consider other sources of information in conjunction with that; we had no record from the census as to these properties; that method of assessment did not enter into our conclusion as to the worth of the transfers; these transfers extend from August, 1912 to July, 1913; there were about 300 altogether. I do not know the total amount of transfers during that time; we instructed our agent to select a special number and take all transfers that appeared bona fide, and from selected transfers and the consideration recited in the deed we found that this property was assessed at 17.9% of the considerations named in the deeds. We applied the same test to all of the counties, and we did

not take that as an absolute guide. Assuming that the deeds rightly stated the consideration and that the party who passed the money paid for it and the party who received it really knew what the valuations were, if those things were rightly reported by the man who said he took them off and verified them, the total showed, as compared with the assessment, that those properties had been assessed at 17.9%. Personally, I think verifying transfers is one of the best methods known to get at a correct conclusion. In this case I verified the check with the unverified; very little difference. Some transfers which were looked over were thrown out. Mr. Fairall did it on the advice of Mr. Mumper, who said some sales were apparently unfair, and that was the judgment of the agent; he picked them out; undoubtedly he could have picked so it would run down even lower if he had wanted to, it is according to what amount they are out and what we are taking, and what we call a verification as to the conclusion we arrive at. It is dependent as to whether or not the parties who bought really knew the worthfulness of the property sold; it often happens that the price paid for property is more than its value, but I think a great many deeds hide the values rather than swell them; there are a great many more deeds that recite a dollar than otherwise; it did not seem nearly so frequent as I thought it was that the party who purchases puts a higher purchase price in order to exhibit publicly the high worth of the property for future sale, because our tests seemed to average all pretty well, not only
295 according to those deeds, but other counties, but that condition does prevail to some degree. I stated that the property of Weld County had, in my opinion, been underassessed, from these investigations. There were a number of matters [beside*d*] transfers. I thought the [cens*es*] one of the very best comparisons, and this verification is one of the very best. We do not try to get poor methods. I think the actual purchase value of property paid to a prudent seller by a prudent buyer under normal conditions is the best test known, and that is involved in all verified transfers. My whole experience in taxation has been, as county assessor, through all these years, that the census is one of the best tests, and has accomplished the best work that has been accomplished in the state.

A great many people in Weld County who have clocks and watches are exempt, but they should be listed just the same; if they were not listed it legally and actually means they were not covered by the exemption, because the exemption is taken off the total assessment by the assessor. I hardly see how it could be taken off without giving the full value of the assessment, even if the assessor did not pursue the regular method prescribed by the statute, because the assessor returns all the property he has gathered, and at the end he puts the number of exemptions allowed, and taxes for [some]. In order to do that, they necessarily have to be specified in his schedule. Theoretically every deputy should do the thing just that way. But it may be hidden if the deputy goes through the building and comes to a man who has not much property, he passes him by.

The assessed valuation in Weld County for 1912 was, according to my estimate of values, high on sheep only, and low on every-

thing else, except that it was not so low on town and city lots and improvements.

Taking the same method that we put on Weld County property and putting it on the railroad and following the statute just as it reads in section 106, it could not make a difference for the Colorado earnings and not the whole system; leaving this out of it, roughly speaking it would make about $8,000,000 more in the state. The Union Pacific was assessed at something over $13,000 a mile. This would not, following section 106, be far over one-third, that is, it would raise the assessment of 1912 and 1913 about one-third more than it is, I should think. I think we followed the statute pretty closely on stocks and bonds. If we had followed the method prescribed in section 106 as to our estimate of value, excluding the earnings which Mr. Scribner put on in Colorado, it would
296 make about $8,000,000, more than we have on it. The full value is about $23,000,000; and this would make seven millions and a fraction plus a third, or eight millions for 1912, in round numbers. This is an estimation, depending on how we arrived at it. Had we employed similar methods we would have got seven or eight millions more. I have not figured the physical value.

I cannot recall the date of the several conversations above mentioned which I had with Mr. Fischer, the assessor of Weld County. It was during the year after May 20, 1912, and we were doing our work.

I do not recall that Mr. Fischer made any statements to me about the railroad being undervalued by us. I do not think he put me on the defensive in any of these conversations. Mr. Mumper charged that we had not assessed the railroad properly. I did not say to him that I thought it ought to be higher. We explained in detail to the assessors our methods. Following the strict construction of the statute the assessment of the railroad would be higher.

Redirect examination.

By Mr. Dorsey:

If we had followed the statute strictly, it being held that the unit*e* value of an entire system and equal distribution regardless of business and population is fair, I presume the assessment would have been fair, but my judgment is it would have caused the importation of values outside of the state. And it would result in increasing the amount which we attributed to the Colorado lines in the way of value. That statute was passed in 1902. I have been more or less constantly connected with matters of assessment in Colorado since that time.

"Q. Do you happen to know how the law has been administered by all of the assessing bodies which have acted in the assessing of railroad properties in the state of Colorado since 1902?"

Objected to by defendants and objection sustained.

Plaintiff excepts.

Counsel for plaintiff then made the following statement and offer:

I think the Supreme Court of the United States has held a number of times that a practical construction placed upon the statute by officers charged with its administration is a matter of great weight. * * * I offer to prove by this witness, who is
297 now upon the stand and by other witnesses, that consistently and at all times since the adoption of this act of 1902 it has been construed by the assessing bodies of the State of Colorado, being the executive officers charged with its execution, as not requiring the application to any such rigid rule, but as simply giving them the right to take that into consideration with other matters mentioned in the statute for the purpose of arriving at the fair valuation of the property which is located within the state.

Objection of defendants sustained and offer excluded.

To which ruling the plaintiff excepts.

(Counsel for plaintiff here read the statement, from a book entitled "The 13th Census of the United States, 1910, Abstract with Supplement for Colorado," that the population of Weld County at the time of taking the census of 1910 was 39,177.)

J. Frank Adams, a witness called and sworn on behalf of the complainant, testified as follows:

Direct examination:

I am a member of the State Tax Commission, and have been since its inception, May 20, 1912. My full name is J. Frank Adams, and I reside at Denver, Colorado.

I have been Chairman of the State Tax Commission since February, 15, 1913. I participated with the other members in making the assessment of railroads in 1912, including the Union Pacific. I do not know the figure of the valuation as placed on the properties of Union Pacific in Colorado. In determining that value we took into consideration the same elements as in the case of the other companies. We took the stock-and-bond value of the entire system making such deductions as we thought were proper; took the total mileage of the road, including the second track mileage (part of the double track system), and found the total amount for this state; found the amount the road was worth per mile and multiplied by the number of miles in this state, and took the earnings basis for this state and returned by the road, and capitalized that at eight per cent, added the two together, divided by two and took that as the valuation of the road for Colorado. We considered somewhat the value of its physical property in the state, but figured on all roads that that did not represent the market value which the law requires us to ascertain. In my judgment as an assessing officer we thus
298 arrived at a fair value of the property, tangible and intangible of the Union Pacific Railroad constituting its railroad plant within the state of Colorado.

I did not personally check every item of the report filed by Mr. Scribner for the year. I went over the report a number of times. The commission did not accept without investigation the items as reported by Mr. Scribner. They considered each one of the deduc-

tions and used their judgment upon it whether it should or should not be a deduction, being assessed in some other state or having a double assessment on it. I do not remember what source of information was employed. In the matter of average market value of stocks and bonds of Union Pacific and those companies which constitute the investment stocks held by it and sought to be deducted, we checked up Mr. Scribner's statement with the average market value of stock reports and any other information we could get.

In 1912 we assessed at one-third value; in 1913 we tried to ascertain the full value of the company. This is the basis on which the commission has been assessing in 1913. We sent out instructions to local assessors to raise their values to the full cash value, that they would have to come up to the full cash value to have sufficient money to run their counties. We advised them it was our intention to put all property under our jurisdiction at full cash value, by letter and orally.

As to the Weld County assessment for 1912, I have not been there, and have not made any investigations, except a report by Mr. Fairall filed with the commission. I gave the matter very little consideration in connection with the other two members, because they went to Weld County and made this investigation while I conducted some hearings on other matters in Denver. The only knowledge I have on the subject is what has been reported by the other members, and the report of Mr. Fairall which I glanced over, containing percentage table of the transfer values, which has reference to the assessable value. Mr. Fairall was secretary of the Tax Commission from its inception until the spring of this year. He had been for a number of years previous secretary of the State Board of Equalization which did practically the same work as the tax commission. When he made this last investigation he was not secretary, but was employed by the Tax Commission for that purpose.

Cross-examination:

Our board did not keep minutes of [*of*] what figures or methods we used in our conclusions as to the valuation of Union Pa-
299 cific in 1912, unless each one kept it for himself. I do not think it necessary. We examined the statement which is Exhibit A. It was partly our guide. We determined the number of miles of the road active in 1911; I do not remember what it was but could state approximately. We did not determine the total earnings of the road, but determined the earnings in Colorado. I think we used as our basis the statement of Mr. Scribner only. As to stocks and bonds, we did not follow the information given by him entirely, but made some further inquiries. I do not now remember whether we found his valuations were under or over. I do not think we had the entire physical valuation, but just their estimate of it, mostly on rolling stock. That method was considered as descriptive of the road, that is all. We followed the earnings method restricting the earnings to Colorado mileage. I do not know whether this is defined by Mr. Scribner in Exhibit A or not. We got the earnings nowhere except from Exhibit A. As to the other method, we con-

fined that to the stock and bonds as given by Mr. Scribner in Exhibit A, supplemented by some investigations, which I do not recall. We studied these figures. I recall that we investigated the average market price of all the things in Exhibit A, but I do not recall the price or amounts of any of them, nor whether this exhibit was correct or not. By this method we arrived at the conclusion. We did not take into consideration the physical valuation. We added the valuations obtained by the earnings and the stock-and-bonds method and divided by two, and called that the valuation of the mileage in Colorado.

Redirect examination:

Ordinarily, the result of using the three methods, including the physical, is a little lower assessment, which we consider is not the true assessment of the market value. By applying the same method to the same classes of property as required by the constitution, the commission feels that they arrived at an equal assessable value on all property. As to whether the Union Pacific assessment would have been reduced if we had given weight to the value of the physical property in Colorado, I do not know anything about the physical value of the Union Pacific, and I do not think they filed sufficient data with the commission to make such an estimate in 1912, and in 1913 no such return was made on account of the [gove-nment] placing a valuation on the property of all railroads. Therefore, we consider that the stocks and bonds and the earnings method arrive nearer at a market value than any other basis. It is my opinion, and I think,
of the commission, that the railroads are not able to supply
300 us with the proper physical valuation. They are able to supply a description of part of their physical property. In 1912 the Union Pacific returned the physical value and a description of it, because the law requires them to return that value and place their estimate on each item.

HERBERT C. FAIRALL, a witness called and sworn on behalf of the complainant, testified as follows:

Direct examination:

My full name is Herbert C. Fairall. I am publisher of the Daily Journal in Denver. I was secretary of the State Board of Equalization from April, 1909, until May, 1913, and of the Colorado State Tax Commission from May 20, 1912, to May, 1913. I was present as secretary of the Board of Equalization in October 1910, when Mr. Fischer, the assessor of Weld County, was called before that Board in respect to his assessments for that year. That hearing lasted three or four hours, as I remember. Both oral and written instructions were given to him to value the property taxable in his county at one-third its actual value. The statements there made were to the effect that, from the evidence submitted to the board, he had not done this, after that hearing I do not think he made any changes. Mr. Fischer was before the board on the 3rd and again on the 17th of October, 1910. He had made no changes in his

assessments in the interim, and at the second hearing he was instructed to do so. I do not recall now that he was before the board again respecting the assessment of 1910.

No official instructions were given Mr. Fischer about his assessment of 1911, but I am quite sure the members individually asked him if he could not make a better assessment. His excuse always was that he was anxious to make better assessments, but was not given sufficient help. The complaint of the board was that his assessment was too low. The members of the board made a similar complaint as to the 1912 assessment, and had some unofficial conferences with him. For the years 1910, 1911 and 1912 the Board of Equalization or Tax Commission assessed railroad properties at thirty-three and one-third per cent of the full cash value. The board's complaint to Mr. Fischer was that his assessment was not this percentage of the values in his county.

I was secretary of the Tax Commission when the assessment in 1912 was made of railroad properties, and am more or less familiar with the method employed in arriving at those values. The board did not entirely accept, without investigation, the items of
301 the return as sent in by Mr. Scribner for the Union Pacific in that year. I always figured up the average market value of stocks and bonds myself, from the market quotations. The board usually accepted without investigation Mr. Scribner's returns so far as the physical valuations on buildings, rolling stock, machinery, tools and fixtures were concerned. So far as the Union Pacific is concerned, I do not believe the physical valuation entered into the assessment of 1912, at all, so it did not make any difference what the return was. The earnings of the entire line were usually checked with the Interstate Commerce Commission monthly bulletin, but there was no way of segregating to check the states. These reports did not relate to earnings within this state. I checked the earnings by reference to the annual report filed by the Union Pacific with the State Railroad Commission. As a rule I checked the larger roads with the return filed with the railway commission, but I do not recall whether I did in 1912 or not. It was a custom of the office however, and the only available means of checking at all.

I left the office of secretary of the Tax Commission before the assessments for 1913 were made. I have since taken some special work under contract for the commission, getting real estate transfers and assessments. I recently made investigations for the commission as to the assessments made by the Weld county assessor. I got some real estate transfers in July and some assessments this week. I went to Weld County for the purpose of securing those transfers and assessments, but not for the purpose of ascertaining any facts with respect to the assessments which have been made in Weld County. While there I made abstracts of approximately 300 real estate transfers, covering all of the transfers by warranty deed from July 1913, back to August, 1912, eliminating all that showed only a nominal consideration and that showed on their face to be either trades or transfers from one member of the family to another member which might lead me to suspect that the consideration might

be other than legitimate. Later I placed the 1912 assessment opposite the consideration in these deeds. By nominal consideration I mean one dollar, ten dollars or one hundred dollars. I selected 304 deeds to put in my list. My best judgment would be that I rejected six or seven hundred out of all the warranty deeds recorded between the dates mentioned. Probably two-thirds or three-fourths of those rejected recited one dollar considerations, most of the others recited ten or one hundred dollar considerations. With the exception of fifteen or twenty. I went over the entire list with Mr.

302 Mumper, the present assessor, and Charles Bears, a real estate man in Greeley, and asked them to state which transfers they considered as reciting proper considerations and those reciting fictitious or inflated amounts. I wrote "fictitious" on those in which they thought the considerations were inflated. I did not recheck those in making up your final computation, but included them all in my returns to the Tax Commission. About thirty-five of these were verified by the assessor and the real estate man; the rest they knew nothing about. Only in about five cases out of the three or four hundred did they think the price was inflated. I will read into the record those particular instances in which the assessor and the real estate man verified the transfers, giving a description of the property, the price as stated in the deed, the assessed valuation, and the grantor and grantee; File No. 186763, George M. Houston to Leonora E. Jones, N. ½ W. 80 a. of W. ½ N. E. ¼ sec. 12, tp. 5, rg. 66; consideration $7,500; assessment 1912 $1,870. File No. 187605, S. L. W. Ranch Co. to Ben Johnson, S. E. ¼ sec. 13-5-64; consideration $12,500; assessment 1912 $1,340. File No. 187588, S. L. W. Ranch Co. to Andrew Johnson, part of E. ½ E. ½ S. E. ¼ part of E. ½ S. E. ¼, N. E. ¼ 9-5-65, 50 a.; consideration $3,000; assessment 1912 $590. Filing No. 187568, S. L. W. Ranch Co. to George P. Deppe, E. ½ N. W. ¼ 13-5-64; consideration $10,000; assessment 1912 $1,400. Filing No. 187473 S. L. W. Ranch Co. to Charles Johnson, part of W. ½ E. ½ W.½ N. E. ¼, 9-5-64, 31.5 a.; consideration $1,799; assessment $1,580. Filing No. 187791, S. L. W. Ranch Co. to Clarence E. Donovan, E. ½ N. E. ¼, 11-5-64; consideration $4,640; assessment 1912, $800. Filing No. 187455, S. L. W. Ranch Co. to Charles E. Shearer, part of E. ½ S. W. ¼, 10-5-64; consideration $5,400; assessment 1912 $1,510. Filing No. 187454, S. L. W. Ranch Co. to James S. Ogilvie, 79.25 a. in W. ½ N. W. ¼, 13-5-64; consideration $9,500; assessment 1912 $1,400. Filing Nos. 187494 and 187492, S. L. W. Ranch Co. to L. C. Mahlman, W. ½ S. E. ¼ and E. ½ S. E. ¼, 14-5-65; consideration $5,000 and $6,500 respectively; assessment on both pieces 1912 $1,780. Filing No. 187487, S. L. W. Ranch Co. to Joe Gibson, part of E. ½ E. ½ N. W. ¼ E. ½ N. E. ¼ S. W. ¼, 9-5-64, 50.19 a. consideration $2,300; assessment $693. Filing No. 187804, S. L. W. Ranch Co. to Charles Johnson, S. ½ N. E. ¼, 14-5-64; consideration $6,400; assessment $1,580. Filing No. 187791, S. L. W. Ranch Co. to B. Leaderbrand, 53.34 a. in S. E. ¼ S. E. ¼, 5-5-64, and N. E. ¼ N. E. ¼, 8-5-64; consideration $3,200; assessment $451. Filing No. 187889, S. L. W. Ranch Co. to T. L. Parks, W. ½ N. E.

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¼, 11-5-64; consideration $7,700; assessment for 1912 $1,380. Filing No. 189440, Farm Investment Co. to Nettie Bromfield, N. 25 ft. lot 23 and S. 38 ft. lot 22, Cranford's Sub., block 162, Greeley, consideration $7,000; assessment $450. Filing No. 189942,
303 Charles L. Taylor to J. D. Norris, S. ½ S. W. ¼, 6-4-65; consideration $12,000; assessment $891. Book 374, page 225, Eugene Y. Landrum to L. R. Rinker S. W. ¼ S. E. ¼, part of E. ½ S. E. ¼, 12-5-67; consideration $12,500; assessment $900. Book 374, page 206, William Y. Gregg to Frank Jefferson, S. E. ¼ N. W. ¼, S. ½ N. E. ¼, 8-3-68; consideration $15,000; assessment $3,080. Book 374, page 68, Charles L. Fitch to Theodora L. Cooke, W. ½ N. E. ¼, 18-5-64; consideration $12,000, assessment $2,260. Book 365, page 530, Virginius C. Birdsell to George Dreith, E. ½ S. W. ¼, 7-4-68; consideration $14,500; assessment $2,600.

The conveyances I have read into the record were the ones in which the assessor and real estate man said the considerations expressed, in their opinion the actual consideration or near the value of the property. I had several hundred others about which they told me they knew nothing. I have not made any computation with respect to the ones I have read into the record to determine the proportion the transfer value bears to the assessed value. Respecting this large number of other transfers, eliminating those I have marked as fictitious, I have made a computation of the town and city lots only, but not lands. I know approximately what the aggregate averages, including the so-called verified transfers, I do not know the total [—] of assessments or of considerations, but I do know the percentage of assessment to the consideration expressed. It would not make any difference in the per cent to eliminate the five transfers expressing an inflated consideration. The percentage of assessments to recited considerations is about 18%.

I noticed that in taking off the assessments for 1912 many of the farms given would show some acreage assessed at eighteen, twenty, twenty-five, forty or sixty-five dollars an acre, and the balance of the farm assessed as grazing land, at two, three or four dollars an acre. This is true as to practically all farms in the irrigated district which came to my attention. I would not care to make an estimate as to what proportion of a man's farm would be assessed at two or three dollars an acre on the average.

I understand that the purpose of the Tax Commission is to assess all property in its jurisdiction at full cash value, and that efforts have been made to have the assessors in the various counties do likewise with property within their jurisdiction.

304 HERBERT C. FAIRALL, resumed the [state] for further

Direct examination:

The total of the considerations in all of the transfers which I examined in Weld County in 1912 was $1,281,637. The total assessment on the same properties in the same year was $228,035, or 17.9% of the total consideration. The total considerations in the transfers verified, including those O. K'd by the assessor and the real estate

man, and those they objected to, and all of those on which some comment was made by either of them, was $479,933; total assessment on same property, $70,611, or 14.7% of total consideration. Eliminating those transfers the real estate man or the assessor said were fictitious, the total sales value of the remaining verified transfers was $1,141,776; total assessment on same property, $215,705, or a little over 19% of the sales value.

I had a conversation respecting the full cash value of property in Weld County with Mr. Fischer, who was the assessor making the assessment there in 1910, 1911, and 1912, in the spring of 1913, in the office of the tax commission. He said he thought the present assessor would not reach the full value of the county, and that in his judgment approximately the full value of the entire county should be $100,000,000. He did not say definitely whether he meant the property which was assessed by the county assessor, but I presume he meant the abstract of assessment should total about that amount on a full cash value basis.

Cross-examination:

This conversation occurred either in January, February or March, 1913. Just Mr. Fischer and myself were present. I was then secretary of the Tax Commission. He said in substance that the present assessor would not reach the full value of Weld County in the assessment for this year. Mr. Fischer said in his judgment the whole assessment value should approximate $100,000,000. I cannot give the words he said, but that is about all the conversation, except he said he [though-] Mr. Mumper would reach between $50,000,000 and $60,000,000 only. He did not specify to me as to what the other value was, whether it was railroad property, utilities of any character. I think he had once or twice assumed the attitude that the railroad had not been properly assessed. I think it was not over twice that he made the declaration that the railroad had not been properly assessed. I would not attempt to say that Mr. Fischer's declaration of the total assessable value did not include the Union Pacific, The Bur-
305 lington, the Denver, Laramie and Northwestern and the Colorado and Southern, and all the railroads and utilities and all the properties in the county. I do not know just what he meant, but imagine he meant that the full cash assessable value of everything in the county that was taxable would be $100,000,000. He did not at that time make any statement that his assessments were wrong. He did not say anything to the effect that if all these railroads were properly assessed the total value would be $100,000,000, assuming the assessments on the property to be as he had placed them. Only Mr. Fischer and myself were present. I made no minutes of this conversation. I had a number of other conversations with Mr. Fischer. I first met Mr. Fischer in April or May 1909, when I was appointed secretary of the board of Equalization, shortly after Mr. Fischer's election as assessor. This meeting was at a meeting of all the county assessors of the state. The assessors had taken office the preceding January, but whether Mr. Fischer had held office before I do not know. My conversation there with him was concerning mat

ters under discussion by this convention, at which fifty or sixty were present. At that time I had no particular conversations with him as to the Weld assessment. The purpose of that gathering was to secure so far as possible, uniformity of action in the estimation, assessments, and levies in the several counties, and thereafter to work in common to get equality between the burdens so placed and the burdens placed by the State Board. I do not recall any conversations at this convention with Mr. Fischer about the assessment. I did not know anything about the conditions in Weld County then. I had a number of other conversations in 1909. None of those were conversations that I narrated in testimony in chief. I do not recall any conversations with him in the spring of 1910. I do not recall any specific conversations except those referring to the meeting of th- board in October, 1910. I am quite sure Mr. Fischer was in the office once or twice in October, 1910. My affidavit concerns official action of the board in 1910, which was the result of a complaint of Mr. Mulford, a Weld County tax payer. He contended that he was over assessed—not uniformly assessed with other tax payers. The thing always complained of is non-uniformity and special burden on the complainant. At that time we got from Mr. Mulford or from some person, a list of the lands called to the attention of our board as being underassessed. I do not recall whether they were furnished by the Union Pacific. We had lists already furnished of mortgages
306 and also transfers. I do not remember who furnished them. I do not know that it was a picked list. This list was a portion of the list in Exhibit F of my affidavit, and was a portion of the evidence submitted. I do not think they submitted all of the evidence to Fischer. It may be all.

Fischer came down before the board pursuant to its request concerning the assessment in this list of lands, and his attention was called to what was considered an underassessment, in view of the recited considerations in the deeds or mortgages. I do not recall whether that list is transfers or mortgages. There was introduced in evidence before the board that list, which had been furnished by somebody, and Mr. Mulford gave testimony as to the values of property, and I think there was some representative of Weld County there whom Mr. Mulford had brought. No order regarding the assessment was issued to Fischer under section 90 or 91 of the statute. His attention was called to this claim and he has asked to look it up. The board never made any orders under sections 90 and 91. I do not recall what Mr. Fischer said before the board. There was no further action taken by the board after that in regard to the matter. However, I afterward wrote a letter to Fischer in response to a communication from him. I do not know what he did when he went to Greeley; he wrote me a letter, but did not state in the letter or orally, that he had examined the considerations. I do not think I got any information that he had looked them up. The letter is in the office of the Tax Commission. I have not seen it since that time. I do not recall t-e purport of it. On my own responsibility I replied, and stated what the board intended he should do. I would not care to pass upon sections 90 and 91 of the statute so as to say that it is mandatory on the board to command any county assessor they believe

has under assessed to change the assessment; I know there are some provisions intending something of that kind. The board and myself knew that no order had been given, only so far as the affidavit shows.

I do not recall whether Mr. Fischer was in my office after this in 1910 or not. I have stated that the board talked with him about his assessment in 1910, but do not pretend to recite any conversation. The board complained to him that his assessment was too low, and his excuse was that he did not have enough help. I do not pretend to remember his statements accurately, but I recall this much of the substance. He said he did not have enough help, which would include both office and field force.

307 There were two meetings in October 1910. One was not very lengthy, but the other extended some three or four hours, and was the consideration of unequal assessments and instances shown in complaints of Mr. Mulford and others. The first meeting was October 3rd or 4th. Fischer was ordered to reconstruct his assessment by October 17. Shortly before the 17th I received his letter, and answered immediately on my own accord, so that he could do his work before the 17th if he intended to do it.

I remained Secretary of the Board of Equalization thereafter until the organization of the Tax Commission, and thereafter I was secretary of both until about May 7th last. As to the conversations with Fischer after that in October, 1910, except the one this year as to $100,000,000 assessment, I have generalized only. They occurred in the state house, but I cannot recall the dates, or the persons present, and do not attempt to give the purport of any particular conversation.

I went to Greeley in July this year to get a list of transfers from the books of the recorder, staying from 6 o'clock A. M. to 4:30 P. M. I was taking off transfers and going over them with Mr. Beer. I took off 304 transfers. I could not say that I have ever seen any of the lands concerned. I saw none of the grantors or grantees except Mr. Beer, to whom one conveyance was made. I did not know any of the parties in the deeds I did not take, but looked at the consideration. I have never been engaged in the land business in Weld County. The Beer transfer was Emma C. Ryder to Charles C. Beer, W. 50 ft. of block 32, Greeley, consideration, $1,783, 1912 assessment, $1,000. The percentage of the assessment is pretty close to 60%. I put that in my list. Mr. Beer said this was a matter in probate of some kind, and he had loaned some money to some parties, and had to take the property in that way. I then got the 1913 assessments on these same properties and went back this week to get the 1912 assessments for the Commission, before this trial began. It is possible I have made some error on the assessments; the books are not in the best possible shape. As to #18944, Farm Investment Co. to Bromfield, W. 25 ft. I copied the assessment as $450, the transfer as $7,000. I believe this is according to the records. I did not work so hurriedly as to forego accuracy, but of course mistakes in work of this kind are always possible. On this trip I went at 12:15 and came back on the 7:30 train the following morning. The assessor's office was open in

the evening. I did not do any work anywhere else. I had
308 spoken to Beer on the morning of the first visit and stopped at his office on the way to the depot on the second visit, asking about the particular transfer of his.

Redirect examination:

In the recent conversation I had in 1913 with Mr. Fischer he said he thought Mr. Mumper, then and now assessor, would reach $50,000,000 or $60,000,000. In that conversation Fischer admitted, not in words but by implication, that his assessment was wrong.

The hearings in October, 1910, before the Board of Equalization referred to the entire assessment. The properties mentioned in the exhibit to my affidavit were only instances. While I was secretary the Board under sections 90 and 91 (Secs. 5636 and 5637, Rev. St. 1908) made some orders as to Huerfano county, but not as to Weld. The former boards did. The experience of the board has been that assessors paid no attention to the orders, and the court decisions rather limited the board's powers, so they felt persuasive action was better sometimes. These sections provide for the enforcement of orders by removal of assessors. The board felt that orders of that kind would be ineffective.

GEORGE G. HOLCOMB, called and sworn on behalf of complainant, testified:

Direct examination:

My name is George G. Holcomb. I live in Omaha, and am Assistant Tax Commissioner of Union Pacific. This is my eighth year in that department.

I made quite extensive investigations in 1909, 1910, 1911, 1912 and 1913 as to Weld County assessments, for each preceding year. In 1910 I was in Greeley and Weld County about three months; in 1911, parts of four months; in 1912, parts of two months; and in 1913, just a short space of time.

I have examined the schedules returned covering real estate and personal property, (but not those covering personal property exclusively) returned for 1912, on file in the assessors' office. There are 9828 schedules covering both real and personal property, of which 3936 are unsigned, either by the person making the return, the assessor, or his deputy. Some of the balance were not sworn to. Upon the schedules the portions covering real estate descriptions were filled in. I would say that on less than 1% were all the interrogatories on personal property filled in.

309 In 1912 the assessor took no statement of indebtedness from any people whose property he was assessing. I was present in Weld County in 1912 when the settlement was made for the taxes of 1910 and 1911 between the county and Union Pacific. The meeting was in the court house and there were present the three county commissioners, the county assessor (Mr. A. R. Fischer), the county attorney, the county treasurer (who came in and out [as] different times), Mr. Scribner, myself, and Attorney Thayer. The

meeting occurred April 30, 1912, and the settlement related to the taxes upon the Weld County assessment for the years 1910 and 1911.

The assessor was at that time making the assessment for 1912, and there was quite an extended discussion on that subject, participated in by the county commissioners, the assessor, Mr. Scribner and myself, and possibly Mr. Patterson, the county attorney, was in and out. Mr. Fischer admitted that his assessment was low and showed a sincere effort to get a fair one, suggesting that the county be divided into three districts and appraisers appointed to appraise lands and contractors, employed to appraise improvements. The plan was to cover the county in automobiles and that I go along in the machine with Mr. Fischer. The commissioners approved the plan, but complained about expenses and doubted if the county could be covered in that time and whether the contractors would go out at that time. The plan was not carried out in any way. The Union Pacific assessment for 1912 was not increased over 1911. The assessment Fischer admitted was low was for 1911.

I made an affidavit in this case. (Here read by counsel.) The list of transfers in this affidavit includes the warranty deeds in Weld County for 40 acres or over, exclusive of deeds with a consideration which is nominal or includes love and affection, and of deeds pursuant to contracts made years before. All nondescript deeds (description by metes and bounds) were also excluded, because of difficulty of locating assessment in as-essor's office. With these exceptions all warranty deeds between periods mentioned in affidavit were taken.

In Exhibit A to affidavit I put assessor's valuation for 1910 after each transfer. I have plats covering all the county and have denoted thereon assessor's assessments for 1909 and 1910 on the various tracts, except as to some around Greeley and Evans too small for such notation. This same information is entered for 1912. By reference I can state the assessment on each tract for 1909, 1910 and 1912. The assessments so shown for 1912 are correct according to county
310 records. According to Exhibit A, the total valuation as given by the considerations in these deeds is $4,004,867; the 1910 assessment is $609,100 or 15.21% of full value as shown by considerations. The 1912 assessment is $651,351, or 16.26% of value shown by considerations. In verifying the deeds I went in an automobile and asked grantors or grantees about consideration. This was in 1911. I selected no particular deeds, only I went on good roads. In one instance I found actual consideration was $7,200, instead of $7,400 as stated in the deed. In two instances there was a nominal increase over consideration shown in the deed. Exhibit B covers all verified deeds. I satisfied myself by the method described that the considerations in these deeds were the actual considerations. I did not verify all the deeds, then, and have had no opportunity since. The figures on Exhibit B opposite each transfer correctly show the 1912 assessment on each parcel of land. The figure at the bottom of the Exhibit showing the percentage of assessed value to sales value to be 19.56% is correct. The figure $79,950 at the bottom of the Exhibit shows the 1910 assessed valuation of the

properties there described. The figure showing the percentage of 1910 assessed valuation of these properties to sales value to be 18.53% is correct. Reference to a map shows that Exhibit B covers the whole county except town lots and small tracts. It covers tracts in township and range 7-66, 7-65, 7-64, 6-65, 7-65, 1-66, 6-64, 6-27, 5-66, 5-67, 1-68, 4-68, 3-67, 3-66, and 2-66, so the deeds which I verified were scattered over the county pretty generally. I have examined the county records to ascertain what assessments were placed upon the lands within the Greeley-Poudre Irrigation District for 1912. The average assessment per acre was $3.34 (the Court: the total acreage subject to taxation in the district was shown to be about 90,000 acres I think.) In the various investigations I spent a great deal of time in the assessor's office. In the case of irrigated land the practice of the assessor in 1912 was to assess what was actually cropped, so if a man had 160 acres of irrigable land with a water right covering it all, and chose to crop 80 acres and let the other remain pasture, 80 acres was assessed as the high-priced land and 80 at a grazing value. My knowledge is that the assessor's office never made any effort to ascertain the moneys, notes and credits, especially the bank accounts, of people whose schedules were taken. Working in the office I heard a great many schedules made out. I never heard these questions asked by the person making the schedule. When asking about money in the bank the assessor and his office force would say, "Now you haven't got any more money in the bank than to check in and out," which necessarily inspired the answer No.

311 As to deed mentioned in Exhibit A to affidavit of Arthur H. Scribner, on page 8 of the Exhibit, covering S. E. ¼ N. W. ¼ and S. ½ N. E. ¼ and S. ½ sec. 13, and S. ½ S. W. ¼ and S. E. ¼ sec. 14; S. E. ¼ sec. 15, and N. ½ N. ½ sec. 23, tp. 4 rg. 62, aggregating 1,000 acres, yesterday morning I asked T. B. McPherson, who purchased this land, if $125,000 as stated in the Exhibit, was the true and bona fide consideration, and he said, "Absolutely correct." The 1912 assessed valuation upon that land including improvements, was $4,700, at the rate of $4.70 per acre, the sale price being $125 per acre. (Witness here points out location of this land relative to the Riverside Reservoir.) It is in 4-62. I know nothing of the character of the land. This McPherson lives in Omaha; whether he had the rendering works on Cut-off Island I do not know, but I know the gentleman. I have repeated the conversation I had with him. I do not know whether this is the Smiley piece or about the seepage from the reservoir, as I have no personal knowledge of the land, however, I know the business reputation of Mr. McPherson, and would believe him when he says the land has a value of $125,000 in cash. My affidavit shows average percentage of assessment to real value different from the percentage in this instance, which is a little over 3%. The method of verifying this sale was to ask McPherson if the consideration was $125,000, and he said "Absolutely correct;" that was all that was said.

GEORGE G. HOLCOMB resumed the stand for further direct examination.

I have examined Mr. Fisher's final assessment roll for 1910 to ascertain whether he raised his assessment upon specific tracts as ordered in a communication dated October 18, 1910, from the Board of Equalization to him, appearing in Exhibit F to affidavit of H. C. Fairall. Instead of raising the assessment on these tracts he reduced it from $126,530 to $126,250. This assessment for 1912 was raised from $126,250 to $133,630. In nearly all instances the increase was for improvements added since 1910.

The transfers in the affidavit of Arthur H. Scribner covers farms in almost every township in the county. The assessed valuation appearing after each description of land in Exhibit A to affidavit of Henry T. Proctor is correct according to the Weld county records. The total actual valuation is a mere computation from the acreage and value per acre as given by Mr. Proctor. In Exhibit B to Mr. Proctor's affidavit the 1912 assessment appearing after each description of land is correct according to the Weld County
312 records. Grover, lands in the vicinity of which are referred to in Mr. Proctor's affidavit, is in the northeasterly part of Weld County, on section 5-10-61. The patented non-irrigated lands referred to by Mr. Proctor as of an average value of $10 per acre are in townships 9-61, 62 and 63; 10-61, 62 and 63; 11-61, 62, 63, and 64; 12-61, 62 and 63. The 1912 assessed [*values*] of these lands per acre are; In township 9, range 61, the majority of the land is assessed at $1, some at $1.25, and a very few acres at $2.00; in 10-61, for the entire farm, with some improvements, the assessments run $50 on some farms and $100 on others; in 9-62 the assessment runs $1, $1.50 and $2.00; in 9-63 all which is assessed is assessed at $1, except one section assessed at $2; parts of 10-61 are assessed at $1, $2, $3, $5 and $1.25, only one quarter section (owned by the Burlington) being assessed at $5, and the average assessment not being over $2. I do not know whether any of the lands there are irrigated by pumping, as stated in Mr. Proctor's affidavit. Parts of 10-62 are assessed at $1.25, $1.50, $2, and $2.50, the average being not over $2. All of 10-63 is assessed at $1, except one half section at $1.50; average, a little over $1. 11-61 is assessed at $1 and $2; average, approximately $1.50. 11-62 is assessed at $1, $2 and $5; average, approximately $2.25. I do not know whether any lands in that township were irrigated by pumping. 11-63 is all assessed at $1, except one section at $1.25. All of 12-61 is at $1. 12-62 is assessed at $1, $2, $5 and $10. I do not know whether lands in that township were irrigated by pumping. I would be safe in saying that the average assessment was not $5. 12-63 is all assessed at $1, except 40 acres at $2. (Exhibit A to Mr. Proctor's affidavit here read.)

The assessed value for 1912 appearing after each parcel embraced in lists in affidavit of G. R. Gaylor is correct according to Weld County records. Pierce, the residence of Mr. Gaylor, is in sections 26 and 27, township 8, range 66. The lands described in his affidavit are in township 7, range 66; 8-67; 8-66; 8-65; 8-63; 7-65, 9-65; 9-67; 9-66; 9-64. The assessed valuations on this affi-

davit and the other affidavit concerning which I have testified in each instance include the valuation of the improvements as well as the land itself. A reference to the map shows that the lands of which J. U. Harris speaks in his affidavit are located in townships and ranges as follows: 9-56, 7-56, 10-57; 11-57; 12-57, 8-58, 11-58, 7-59, 8-59, 10-59, 7-60, 8-60 (of these six townships are north and south and four east and west); 7, 8, 9, 10, 11-60; 2-61; 3-61; 4-61, 5-61,
8-61, 9-61, 10-61, 1-12, 3-62, 4-62, 5-62, 7-62, 8-62, 9-62,
313 10-62, 11-62, 12-62; 2-63, 4-63, 5-63, 10-63; 7-59 (eastern end
of county); 9-59; 12-61; 11-63; 5-62; 5-64; 1-61; 3-63; 3-62; 3-64; 1-64; 3-65; 6-61; 6-63; 5-64; 3-68; 10 and 11-60; 12-61. Generally speaking Mr. Harris' affidavit covers the county pretty completely.

In the affidavit of Frank A. Ayer the 1912 assessment appearing after each description of land is correct according to Weld County records. These assessments, as well as others I have spoken about, cover both lands and improvements. (Witness here gives township and range locations of these lands. Counsel for plaintiff then states that the affidavit shows the total value of the lands to be $1,162,455, the assessed valuation for 1912, $155,205, or 13.25% of actual value.)

(Witness here points out on map certain lands mentioned in affidavit of F. A. Hensley.) In Mr. Hensley's affidavit the 1912 assessment shown for each piece of land is correct according to Weld County records, and includes both land and improvements.

The 1910 assessments upon the several tracts mentioned in Mr. Hensley's affidavit were as follows: N. W. ¼ sec. 13, tp. 1 N., rg. 65 W., $320. S. E. ¼ sec. 14, tp. 1, N., rg. 65 W., $320. N. W. ¼ sec. 14 same township, $530. N. E. ¼ sec. 19, tp. 2 N., rg. 64 W., $320. S. E. ¼ sec. 19, tp. 2 N., 64 W., $320. S. E. ¼ sec. 23, tp. 2 N. 64 W., $320. Tp. 1 N., rg. 65 W., sec. 5, $1,800.

These assessments include both land and improvements. I made investigations to determine what the average bank deposits in Weld County for year ending April 1, 1912, securing amount of deposits for four days in preceding year for state banks from State Bank Examiner and deposits for as many as possible of these four days for national banks from statements prepared by banks at the call of the comptroller of the currency. As a result of the data thus obtained I have prepared statement marked "Plaintiff's Exhibit D," showing average bank deposits in Weld County for year ending April 1, 1912, for four periods preceding that date, in the case of state banks, and as many of four periods as I could get, in the case of state banks. It shows the average deposits for each bank that year, the total average of deposits in national banks, being $2,273,828.11, in state banks, $699,820.30; total for both national and state banks, average deposits, $2,973,648.41.

Cross-examination:

(Witness here called to map.) In my investigations I have traveled over certain parts of Weld County (indicated). I am perfectly

familiar as to country around Pierce. I do not know whether
314 ranges or townships from 60-68 are range or grass prairie; I do not know whether next range is prairie or not. I have not been around Grover, and have not been over the next tier south, which would be all townships numbered 9. I do not know whether land beyond ditch near Pierce (indicated) is open range or not. I do not know whether Henrylyn is range territory, as we could not get over there in machine on account of sand. I cannot say as to part of land irrigated over which we passed.

In verifying the transfers the questions I asked varied. Sometimes I told persons whom I interrogated that I was verifying land values, and had record of a certain transfer, possibly giving date, and naming grantor and grantee. I would ask if the true consideration was the one stated, and so get the information. I did not personally know the persons with whom I conversed. The following instances are taken from the record I made in verifying sales:

J. Hover to T. P. Roderick, S. ½ S. E. ¼ 18-6-64, consideration, $11,000. My record shows I called on Roderick at the farm on August 10, 1911. He said, "Price is correct," which I noted down before I left him. This was all the information I obtained.

Al Schick to E. and A. McDowell, N. E. ¼ 18-6-64, consideration, $16,500. My notation: Tisdell, the renter says, "Price is O. K."

The cards from which I refresh my memory in these instances I am giving relate to verified sale list set out in exhibit to my affidavit.

C. E. Williams to C. B. Thompson, N. W. ¼ 21-6-64 consideration, $9,250; record, "August 11, 1912, Thompson says price correct." I saw grantee Thompson at farm.

G. A. Bates to J. Valentine, W. ½ S. E. ¼ 33-6-64, consideration $9,250, record, "August 10, 1911, renter on place says Valentine paid $9,000. Valentine lives in Greeley."

W. H. Ross to J. H. Nicks, N. E. ¼ 29-7-64, consideration, $6,400. Record, "Weisel, O. K." There were three of these transactions, which I verified from the real estate man. My abbreviation means that Weisel verified from his knowledge of sale.

O. C. Fleming to T. H. Wilson, N. W. ¼ 3-6-65, consideration, $20,700. "Weisel says O. K." This is same Weisel.

H. Anderson to O. C. Fleming, E. ½ S. E. ¼ 33-7-65, consideration, $16,000. "Weisel O. K."

315 S. Hopkins to W. H. Henderson, E. ½ N. W. ¼ and W. ½ N. E. ¼ 21-6-65, consideration $3,800. On August 10, 1911, "Benton says Henderson paid above for this, with understanding that Benton should buy east half of northwest."

W. H. Henderson, to W. E. Benton, E. ½ N. W. ¼ 21-6-65, consideration, $21,000. "Benton says paid $21,000 for this; Benton will sell for $24,000."

The computation in my exhibit is based on the totals of all of these.

A. Howard to C. C. Howard, W. ½ S. E. ¼ 30-6-65, consideration, $11,500. August 10, 1911, Mrs. Howard, widow of C. C. Howard, says price O. K."

B. R. Williams to F. A. Balch, W. ½ N. E. ¼ 30-6-65, consideration, $23,000. "August 10, 1911, Mrs. Balch says price O. K."

C. E. Douglass to R. A. Barnes, E. ½ E.½ S. W. ¼ 34-6-65, consideration, $8,500. "August 10, 1911, Barnes says price O. K." He and Douglass bought E. ½ S. W. ¼, 80 acres, for $17,000; and he took E. ½ E. ½ S. W. ¼ for $8,500; two and a half story frame house and outbuildings, all built in 1910.

J. T. McCreery to J. E. Steinhoff, N. ½ N. W. ¼ 36-6-65, consideration $18,000. "August 10, 1911, Steinhof says price is correct."

Ira Sherman to Sarah Bogart, S. ½ S. E. ¼ 35-6-65, consideration, $17,000. "August 10, 1911, Bogart says price O. K. and worth as much to-day. Sand Creek water right worth as much as No. 2, continual flow."

E. C. Farr to J. Stodel, N. ½ N. W. ¼ [3-7-65], consideration, $7,500. "Renter on place, paid $7,800; Stodel lives in Windsor."

W. F. Graham to M. Sand, S. W. ¼ 15-7-65, consideration, $18,000. "August 30, 1911, Sand says price is correct."

T. A. Bennett to J. E. Hansen, S. E. ¼ S. W. ¼ and E. ½ S. W. ¼ S. W. ¼ 17-1-66, consideration, $8,260. "June 26, 1911. Mrs. Henderson says paid $8,500 for sixty acres. Two-story brick house one-story brick shed, extra large barn and horse corral, windmill and orchard. Every acre cropped."

T. A. Bennett to John A. Stiles, N. E. ¼ N. W. ¼ and E. ½ N. W. ¼ N. W. ¼, 20-1-66, consideration, $7,500. "June 26, 1911. Mrs. Stiles paid $125 per acre; land all cropped, no buildings."

316 J. B. Ferguson to W. J. Kitterman and F. H. Wright N. ½ 21-1-66, consideration, $18,000. "June 26, 1911, Mrs. Kitterman says paid $20,000; one and a half story house, one frame barn, two fair frame outbuildings; has twenty-one-acre reservoir to catch fall, winter and spring water, and has enough to water crops; grows alfalfa, beets, cabbage and tomatoes."

W. Davis to Fannie Schwab, S. E. ¼ 32-1-66, consideration $2,400. "June 26, 1911, Martin from Wheatland, Wyoming, now owns. Mrs. Martin says that is $4,500 net. One and a half story frame house, one story lean-to, frame shed, barns."

E. A. McKillup, to William H. Lynch, N. ½ S. W. ¼ 20-2-66 consideration $6,000. "June 26, 1911, Mrs. Lynch says traded property in Denver and figured in farm at $4,500. One-story brick house, frame lean-to, four fair outbuildings." She says here she figures equity in farm $4,500.

A. Wigham to D. Black, S. W. ¼ 20-3-66, consideration, $4,500. "June 27, 1911, Wigham now rents of Black, who is dispatcher of U. P. Railroad. 1757 Stout Street, Denver; received $4,500. Four room one-story frame house, one-story three room frame Jap house, fair frame barn and three outbuildings, windmill; 100 acres now being broken for winter wheat; four foot vein of coal digging wind-mill well." I do not know whether coal was found before or after the sale. The 100 acres was broken after the sale.

S. K. Thompson and Davis to M. Mosier, N. E. ¼ 5-5-66, con-

sideration, $11,500. "August 11, 1910, Mosier says price O. K." I think that is a transposition. I think that should be 8/10/11.

A. Allison to E. C. Allison, S. ½ N. W. ¼ 12-7-66, consideration $10,000. "August 30, 1911, Allison says price O. K."

A. Allison to A. L. Allison, N. ½ N. W. ¼ 12-7-66, consideration, $10,000. "August 30, 1911, Allison says price O. K."

Abe Willis to John and J. T. Lucas, N. W. ¼ 6-3-67, except 38.46 acres, consideration, $14,000. "June 27, 1911, Mrs. J. T. Lucas says paid $13,000. All cropped in 1910, but not by Lucas; all in crop in 1911."

H. Koenig to C. E. Freguson, February 24, 1910, S. ½ N. W. ¼ 30-5-67, consideration, $5,000. "August 11, 1911, Koenig on north half of northwest quarter of 30 says Ferguson is sister and price O. K.; has one-story frame."

317 E. Koenig to H. Koenig, N. ½ N. W. ¼ 30-5-67, consideration, $5,500. "Koenig says price O. K." This is August 11, 1911. Has one and a half story brick house; been built two years; one barn. This 1911 refers to when I saw the party.

B. J. (or R. J.) Eaton to Charles Sorrell, S. W. ¼ 13-6-67 consideration $15,000. "October 11, 1910, Mr. Sorrell, in Windsor made statement that paid $15,000 cash, and are worth $150 per acre; has 720 acres more in same locality at $125 per acre, taking together good and bad."

J. J. Youtsey to Henry Horst, N. ½ 31-6-67, consideration, $11,600. "August 11, 1911, no one on this place. Ray on northwest of 32 says "Horst paid $11,600 for this. In 1910 had 160 acres in wheat that averaged twenty-two bushels the acre."

M. Greenfield to T. E. and H. Graham N. E. ¼ 2-1-68, consideration, $14,500. "August 9, 1911, Graham says consideration is correct."

C. A. Z. Tarr to L. H. Hewitt, S. E. ¼ 25-4-68, consideration, $15,000. "June 27, 1911, paid $15,000 for this a year ago. Came from Missouri." (That was to remind me of something.) "Every acre cropped in alfalfa, potatoes, spring and winter wheat. One-story frame house, new, good; good barn and outside cement cellar. Would not sell now for $125 per acre." Mr. Hewitt said that.

GEORGE G. HOLCOMB, resumed the stand for further cross-examination.

The reason thirty-three entries occur in exhibit to my affidavit, although it concerns only thirty-two transactions, is this: In one transaction 160 acres are conveyed, and the grantee of that deed was the grantor conveying the eighty.

Exhibit A is the long list, from January 1, 1909, to August 23, 1910. There are between three and four hundred deeds of record there recited. The transactions mentioned in Exhibit B are the only ones I endeavored to verify. I do not know that the class of deeds I endeavored to verify are in two or three places close in under the ditches, Carrying water right in the deeds, I would say yes. I personally made no effort to verify any of the deeds in Exhibit A which lie out beyond the irrigation works. The reason

I did not do it was that when we started out in the auto we were unable to get roads, and then I was obliged to stop on account of some telegrams I got. The first day from Hudson to Ft. Lupton it took us four hours to come in an [*an*] automobile, myself
318 pushing all the time. Going from Brighton before we got to Hudson we met a farmer who said we could not get through on that road; we then took the east and west road to Ft. Lupton. This experience convinced us that we could average about a hundred miles a day. We were at that three days. That was in 1911.

The deeds in Exhibit A were taken from the records as they came, excluding those carrying nominal considerations. I worked at this list at different times in the fall of 1909 and spring of 1910, possibly some late in 1910 and in spring of 1911. In 1910 I spent one day verifying, in the Windsor district. In 1911 I verified one day in June, and the bulk of them in August, when I spent three days. After I prepared Exhibit A and prior to time I got in sand pile regular work and lack of time prevented my verifying.

I could not say that difference in assessment and consideration on non-irrigated land is greater than in case of irrigated land without [*segregated*] the lands on the list. I made an effort to go over [—] verify range lands once, when I first started out. The reason I verified irrigated lands, was that other people were engaged in districts containing the non-irrigated lands.

I do not know percentage of verified deeds to total number listed. Exhibit A gives all deeds recorded between the first and last dates, except as to lots and nondescripts, farm lands less than forty acres, deeds showing nominal consideration, possibly a few carrying too high a valuation, and Union Pacific deeds pursuant to a contract made several years before and reciting the price, as they were not current transactions. I do not know whether values along the U. P. and within 25-mile limit of its grant above irrigation ditches have enhanced or not since the sales were made. Deeds are excluded carrying a nominal consideration—$1.00 or $10.00 and other valuable considerations, love and affection.

If there were deeds recorded between the dates mentioned in Exhibit A for $150 to $400 for quarter sections out on the range (which fact I do not know,) there might be later deeds covering same property. We would take the last deed.

All I had to do with preparation of Arthur H. Scribner's affidavit was to insert the 1912 assessment, taken from my plats.

The list of names of persons with whom I conferred in verifying transactions included all transactions mentioned in Exhibit
319 B, but not in Exhibit A, and shows all attempts I made with grantors or grantees.

In getting these assessed valuations I was in the assessor's office in 1910, 1911, 1912 and 1913. In years except 1913 Mr. Fischer was county assessor, and he knew me and knew that I was representing the railroad. Mr. McAfee, the present sheriff, was a deputy in the assessor's office in 1910, together with one Charles Phillips, one Johnson, one Palmer and one George Davis. Palmer was a

field deputy for a while and then office man, and was there most of [*time*] time I was there in 1910.

As to conversations which I overheard it seemed apparent that the assessor or deputies were not getting the values; There was one instance when McAfee was taking a schedule of somebody and did not put all the interrogatories on the personal schedule. In regard to money being taxed, he said, "Don't tell me you have got any more than you check on." The fellow said, "I haven't got anything." I am sorry I did not take down the name of the person. The same year a fellow came in and listed a buggy without a horse. I inquired afterwards that it was pretty strange to list a buggy and not have a horse, but there was no effort made to get it listed. These are two instances which impressed themselves on my mind. And in taking the tax schedules in the office the interrogatories on the personal property taxes were not put at all. They generally gave the assessment of the previous year for the real estate valuation. Instances like these two were going on all the time. Generally, they evaded personal property values during 1910 by neglecting to ask the questions. During this time I was compiling data. I never recorded any data so that I could name the persons.

If there was a larger total assessment each year than before it was made up of new property, added improvements on farms and lots, and government property, final receipts being given, coming under taxation for the first time. I do not know whether the assessment in 1911 was $14,889,850 and in 1912 $15,421,210. If you take the assessment and eliminate the property taxed for the first time, the assessment in 1912 was lower than in 1911.

The plats from which I testified contain 118 townships. The first contention between Union Pacific and the county arose as to 1910 taxes, during the summer and fall of that year. I do not know what year the Union Pacific coal reserves came under taxation; I do not know whether the first question as to these came up before or after Fischer was called before the State Board in 1910.

320 I was working in Weld County in the summer of 1910; the incident Mr. Fairall described as to Mr. Fischer being called to Denver occurred in October, 1910 I think I made up the plats in 1910. I do not remember a conference in regard to settlement on 1910 taxes. The settlement as to 1910 and 1911 taxes occurred April 30, 1912. This conference was in the court house across the hall back of the stairway from the assessor's office. I do not remember another conference in the county commissioner's room. There were present at this conference in the county court room Commissioners Hodgson, Levis, Bolander, the county attorney (I think his name was Todd), A. R. Fischer, (county assessor) Treasurer Patterson (who came in and out), attorney Thayer, A. W. Scribner, and myself. There Fischer said the assessment was too low. Of course the commissioners from their standpoint were trying to make as good a settlement as they could. I think the Union Pacific representatives were asked to retire two or three times when the county representatives were considering. I think all the commissioners joined in with the idea, suggested there, that an appraisement be

made. The Union Pacific made no promise unless improvement was shown in protecting its interests, the compromise being as to 1910 and 1911 taxes. The County accepted sixty per cent of the 1910 taxes and a certain percentage of the 1911 with the state taxes. There is a difference in the State tax. I would not undertake to give the figures.

I do not show on my plats the assessment on school lands until the deed passed and the man became the fee owner. If he only paid part down, he would be assessed according to what he paid in, plus his fences and a little improvements.

So far as these sheets (indicated) show, school land sales occurred plentifully in 1909 and 1910 and less in 1911 and none in 1912 and none in 1913.

Redirect examination:

In my investigations in verifying sales, I had cards made out, and at the time of verification I made entries as to the verification, as a rule, before I left the farm. Mr. Weisel a real estate agent, verified three sales, because he had negotiated them and knew the selling price.

In respect to conveyance from one Tarr to one Hewitt, Hewitt said he came from Missouri to buy a farm in Weld County, and his wife chose one of five places he had selected as suitable.

321 List in affidavit of J. U. Harris concerning sales of state lands stops abruptly on November 1, 1911, and does not purport to give data after that date. When I said there were no sales in 1912 or 1913 I referred merely to what the list shows, and not as to the facts. (See abstract of page 408).

I stopped my efforts to make verifications regarding the deeds in the fall of 1911, and the following April 30th Union Pacific made a settlement with the county as to disputed taxes. I did not continue to verify, as we had no need for verification of 1910 and 1911 taxes, because we had settled them. A good deal of the data which has been produced here was prepared in anticipation of a legal contest over the 1910 assessment.

Opposite each description of land in Mr. Ayer's affidavit appears a figure under the head of assessed valuation "12". These figures correctly state the respective assessed valuations for 1912 on each tract described, ac-ording to Weld County records, and cover both land and improvements.

As appears from the Exhibits in evidence the assessor, after setting down his valuations on lands, puts down a valuation under a separate heading, designated "Improvements on above lands." From my examination of the assessments, I can say that this does not include water rights, but includes houses, barns and fencing. He has not done this accurately, judging from those I saw on farms where I made verifications. The following instances are from the records I made when verifying: Deed recorded in book 325, page 202; two and a half story frame house, good outbuildings, all built in 1910; no other improvements assessed. N. ½ 21-1-66, one-half story frame house, one frame barn, two fair frame outbuildings; total assessment

$350. E. ½ S. E. ¼ 32-1-66; one and a half story frame house, one story lean-to, frame shed and barn; no improvements assessed. N. ½ S. W. ¼ 20-2-66, one-story brick house, frame lean-to and four fair outbuildings, assessed valuation $100. S. W. ¼ 20-3-66, four room, one-story frame, one-story three-and-a-half room frame Jap house, fair frame barn and three outbuildings; improvements assessed at $100. N. ½ N. W. ¼ 30-5-67, one-and-a-half story brick house, been built two years. This was not assessed in 1909.

In respect to lands which I inspected, as described in my cards, it appears that in a great many, if not nearly all of the instances water rights were included in the transfer, the deed reciting the number of shares and the company. The 1912 assessments as to these properties show what is assessed as irrigated lands and
322 what as grazing lands, as follows: S. ½ S. E. ¼ 18-6-64, 70 acres at $20 and 10 at $3. N. E. ¼ 18-6-64, 140 acres at $20, 20 at $3. N. W. ¼ 21-6-64, 160 acres at $5. S. ¼ S. E. ¼ 35-6-65, 75 at $40, 5 at $4. N. ¼ N. W. ¼ 3-7-65, 70 at $20, 10 at $6. S. E. ¼ S. W. ¼ and E. ½ S. W. ¼ S. W. ¼ 17-1-66 40 at $20, 14 at $3. N. ½ 21-1-66, 290 at $8, 30 at $3. N ½ S. W. ¼ 20-2-66, 40 at $20, 28 at $3. N. E. ¼ 5-5-66, 130 at $15, 30 at $3. S. ½ N. W. ¼ 12-7-66, 68 at $30, 2 at $5. N. ½ N. W. ¼ 12-7-66, 65 at $25, 15 at $3. S. ½ N. W. ¼, 30-5-67, 40 at $20, 40 at $5. N. E. ¼ 2-1-68, 100 at $10, 60 at $5. S. E. ¼ 25-4-68, 90 at $20, 70 at $3. I have not added improvements to these. I was not making any investigation as to this, but these instances just occurred when I was making verifications. The 1912 assessment was made six months after the verification. In all the foregoing instances the deeds convey water rights.

SCOTT DAVIS, called and sworn on behalf of complainant, testified:

Direct examination.

My name is Scott Davis, I live in Denver, am livestock agent of the Union Pacific, and have been for about 18 years. I have been identified with the livestock business 25 or 30 years; in Colorado, 10 years. My business is such as to make me familiar with the numbers of livestock in certain localities and with their market value.

My judgment is that there were in 1912 about as many range cattle in Weld County (excluding "feed cattle" and dairy cattle) as in 1910, which is probably 10,000. The number of sheep in 1912 was about the same as in 1910. In 1912 I should say there were about 10,000 "feed cattle," that is, being fattened for the market in enclosures. The average value of feed cattle ready for the market in Weld County in 1912 was from $75 to $90 a head; range cattle, about $45 a head. Averaging feed and range cattle together, the value would be about $65 a head. The average value of sheep in the county for 1912 was about $6 a head; average value of dairy cows, $60 to $65 a head.

Cross-examination:

These figures as to the number of cattle are approximations. Dairy cattle are not included in the estimate of 10,000 range cattle. My calculation is based upon what people told me about the numbers they owned. In summer a good many of these cattle range in and out of Weld County. The cattle pass and repass the line about 20 miles long between Larimer and Weld; the cattle in Wyoming
323 pass and repass all along the northern line; the same is true on the eastern line of Weld County. All I mean to say is that 10,000 would be my guess as to the number of range cattle in 1912. I could not say as to the number of dairy cows. There were more range cattle in Weld County in 1907, 1908 and 1909 than now. There were more moving in 1910 and 1911 than now, but I think there were about the same number there in 1911 and 1912. The dry farmers settling have decreased the range, but the cattlemen protect themselves by buying land and leasing from the dry farmers at something like $10 a quarter section a year. There are about 7,000 cattle on Charlie Allen's ranch at Hardin. The farmers take up a quarter section, prove it up and lease it out; grazing is about all it is good for. It takes about 20 acres to support a steer the year round, so 160 would take care of about eight animals the year round, more in summer, less in winter. The range men feed a whole lot more now; they can not depend on outside range any more in winter which is one of the reasons that the numbers of cattle on these ranges have decreased. In winter they take the cattle to the ranches where they put up the hay. The number of cattle would run about the same all the time. Some of the feed cattle feed a short and some a long period. A short feed cannot be made on sheep; it runs from three to four months on sheep on the lands. Range sheep are not fed. There are not very many range sheep there, Warren has some. Some of his sheep range in Weld but the principal part of his range is north of Weld. The range cattle business is not as extensive as it used to be. In the irrigated portion of the county, the cattle business is very small as compared with farming. Most farmers will just have cows for milk. This [—] particularly true in the potato and beet district. The irrigated country is not what is called a cattle or sheep country at all. Galloway of Greeley owns his ranges and runs a lot of cattle in the Boxelder Valley; Sanford runs a lot; down below Hardin, on the river; Edgar and John Painter on Lost Creek run a good many. The number of cattle in the Lost Creek section down the river near Eagle's Nest, and Boxelder is small as compared with ten years ago; it is less than it was five years ago; I do not know as to three years ago; They are in the business, have a range that will carry so many, and run about that many now. All of Weld County outside of the irrigated district, before dry farming commenced, was a regular range for cattle, horses and sheep, and that is the country where I say these numbers have shrunken by reason of the causes I have given. There are now probably 10,000 actual range cattle.

324 (*Testimony for Defendants.*)

A. R. FISCHER, called on behalf of respondents, testified:

Direct examination:

My name is A. R. Fischer, I have lived at Ft. Lupton, in the southern part of Weld County, between 27 and 28 years. I am now engaged in farming, to a certain extent. I have also had a general store in Ft. Lupton.

I am acquainted in the vicinity of Ft. Lupton and know the conditions concerning the farm lands there. I am acquainted with the names, locations and lands under the several irrigation ditches taking water from the source of supply in that vicinity, which is the Platte river. The ditches having early priorities have water during the irrigation season and some with the later priorities get no water at all.

I have a general acquaintance with Weld County. I think the map marked "Map of Weld County," prepared by the county surveyors, shows the ditches and reservoirs fairly well. I have been over practically all the county, by railroad automobile and driving, and am acquainted with the range country and as well with the lands under ditches. I have been over pretty nearly all the territory lying east of the Platte river and shown south of the river, in the southeastern part of the county, except a little piece along the eastern portion. I have been as far east as Lost Creek, but not Kiowa, as I came up Horse Creek. I have been across the northern part of the county, farther than Pawnee Buttes on one occasion. I have been to Grover in the eastern part on numerous occasions. I have some knowledge of the irrigated lands under the ditches out of the St. Vrain, Thompson and Cache la Poudre rivers, but not so much in the St. Vrain. I have some on the Poudre, but not as well as down at the south end; but generally speaking, I know the lands and where they are and have been over them.

I was elected Weld County Assessor in November, 1908, and took office January 14, 1909, holding office for four years thereafter, being elected twice. I was not a candidate for election in 1913 following the 1912 assessment.

Myself and assistants tried to determine a fair value of property through a number of different angles, not particularly the consideration in deeds, but what the land might return the different water rights, location, proximity to market, and other facilities. I would say that locally assessed property during all my term of office
325 was assessed at about thirty-three and a third per cent; on the decreased value of property it might possibly be a little more in 1912 on some.

To obtain the values for [ass-ment] we used plats of the entire county. In 1909 we took from the plat books practically the same value used in 1908, in regard to lands, using our judgment and trying to get an equitable assessment. In 1910 I made some changes. After becoming more thoroughly acquainted with the county, I

made some changes in several localities I thought were possibly low, and took personal property at one-third all the way through. In gathering these valuations between 16 and 20 field men helped me, which number is necessary to go out and get the valuations. In 1912 about the same number assisted. I tried to get the most competent help, divided the county into districts and chose an assistant in each district who had lived there a number of years and was conversant with all conditions and well acquainted.

A person living in an irrigated district is the best person to value that district, being familiar with conditions of ditches, rights and priorities and conditions of his neighbor's farms. I do not think an outsider could value land in such a district, because of conditions affecting value; such as gravel beds and sand hills down south, loam and adobe on different sides of the river, draws, breaks, creeks in addition to water priorities.

The South Platte does not flow regularly in our vicinity. In the spring we have possibly an excess of water, which begins to decrease at or before June 1st. From then on (speaking particularly of ditch I am under) we sectionize, the sections succeeding one another in use of water for a period. In other ditches some can get no water at all, on account of character of their [priority.] In the Brantner and Lupton bottom there is a fairly adequate supply, that is, their priority is all right, if the water is in the river. Some ditches have no water except in the fall, spring or winter. The appearance of the ditches to a stranger does not vary. It would take a man sometime to acquaint himself with the water supply available to lands under any ditch. The conditions of variance prevail throughout the county. Each year I selected deputies who had lived in their districts a number of years and gave them plat books segregating the agricultural from the grazing land and showing assessment for the previous year, which they were not obliged to follow. Conditions in our vicinity change from year to year, but possibly not so much as in other parts of the county. These changes consist in decreasing agricultural acreage in the case of seeped land in
326 other cases, making gradations of ditches lower, which would add some acreage. Our people formerly thought that a four to six per cent grade was necessary to carry water, but have since learned that they can carry on a two or three per cent grade with a good ditch. (Counsel and witness here agree that a two or three per cent grade is two or three feet to the mile, and that this would be seven per cent.) In this way the ditch can go a little higher and give a little more irrigable land. The Fulton Highline is higher than the old ditch, but carries no water (it being believed that the courts would not permit it) so the lands under it are not watered.

In certain seasons it would be pretty hard for unaccustomed persons, in viewing practically worthless lands, to discern that they were seeped.

In 1910 I gave written instructions to my assessors, verbal instructions in the other years. I always kept the same deputies where I possibly could. Some of them acted during my whole term. Deputies were required who would acquaint themselves with condi-

tions and do the work in the best possible manner; by retaining them I got better service.

In 1910 I gave both typewritten and verbal instructions. 1910 instructions were practically the same as in other years; their purport was that deputies should show no partiality or discrimination and should use their judgment. Gave them plats and prices of the different lands and of personal property and instructed them that in case they found assessments had been low their ideas were to prevail, and that we wanted an equitable assessment. The instructions in 1909 were practically the same. I told them they should not necessarily follow valuation of the owner, but we had a price which was to be their guide. For instance, I would give them a range of from $30 to $60 on horses on a one-third valuation. In exceptional cases values might be more. The range on cattle, except milch cows, was from $10 to $20 on a one-third valuation. They were instructed that in case they found the value to be under or over this range, they should use that option in assessing. In this way they came to their conclusion as to the value. Either I or a deputy in the office would talk to and instruct these assistants, separately, or two or three together. They were instructed to propound to taxpayers every inquiry on the schedule. In 1909, 1910 and 1911, as we were short of help in the office, I told them to make all valuation and in a cipher—if necessary, lumping different articles together to make such a value. This was to facilitate the making of our extensions.
327 I do not think this would have the effect of raising or lowering the total assessment. If a man had a farm implement, for instance, not worth $10 on a one-third basis, a pig might be included in the valuation, and both shown on the schedule under "farm implements." No specific instructions were given as to moneys, and credits, except as in the case of other personal property, which were to ask the questions.

In each year I called the deputies to the office and gave the same general instructions as given in 1910. In 1912 new plat books, made up from 1911, with some modifications, were furnished. These new plats did not show the proportion of farming to grazing land, but deputies were required to get a new proportion of acreage as to each property. So that if there had been any seepage, or reclamation, or new lands brought under irrigation, they were to get this from the farmer and view it themselves as near as they could. My recollection is that in 1912 somewhere around 265,000 acres were returned, which I think was more than had ever been returned before.

While I do not recall instances, I presume I changed assessments of the deputies if erroneous in my judgment. Our force was small, but in practically all instances we tried to separate schedules in which the proportion of irrigated lands was lowered and take it up with the deputy, and modified the assessment if conditions required it.

In 1911 very close to 11,000 schedules were in the office. I presume a great many were not signed. I would say there are between 2,500 and 3,000 schedules in the office pertaining to property owned

by persons residing without the county. I asked the deputies to value property when they did not find the owner, but the particular schedule for that property was generally written in the office. They were asked to make all the notations they could so we would have the data, which I think they did in most cases, although I do not recall specific instances. We tried to find property of these people who had not returned schedules. The first thing we tried to do in the spring was to mail schedules to non-residents of the county subject to taxation of which there were about 2,500. A very small proportion of these came back signed. We wrote up schedules for the others in the office, assessing the property the same as the surrounding property.

The deputies went out in March and were approximately thirty days in the field. After that we do what is termed blocking the schedules, then merely write the schedules on the taxroll, from which we take the abstract, and then extend them on different levies.

Then we give the treasurer the tax roll, which is the make-up from all this work.

328 According to the auditor's report for 1908 and 1909, the aggregate assessment of Weld County local property was $12,349,330 for 1908 it was $12,920,120 for 1909.

I recall no specific complaint in 1909 that the assessment was too low; we might have been included generally, as the corporations were complaining about all the counties.

In 1909 I met with the Colorado county assessors at the State Capitol, who were called together by the Board of Equalization. At different times all the members of the board were present, although all were not present at any one time.

A committee of assessors had been appointed to confer with the state board. It was found that a forty per cent assessment should be made by all assessing bodies to take care of the appropriations of the legislature. A resolution to this effect was voted on by the assessors, and was amended to read thirty-three and a third per cent.

There was a meeting of the assessors on the second Tuesday in August, as required by statute, and possibly the State Board may have been there, taking no part except to address them.

At this meeting in May, I think it was, it was suggested that a committee of assessors be appointed to sit with the State Board while they determined the valuations of the corporations. The assessors appointed as this committee were T. D. Foster, of Teller County, Mr. Smith, of Mesa, and myself, and we sat with the State Board from the latter part of May, trying to assist them in getting a fair value on corporate property which they assessed. I do not recall sitting with them any other time. I am rather inclined to think we did not in September when the objections were heard.

I acted in conjunction with the State Board in examining railroad properties without Weld County, so far as physical value was concerned. We visited the Santa Fe shops at La Junta, the D. & R. G. at Pueblo or Colorado Springs, the shops at Burnham, and the C. & S. shops in the western part of Denver, then taking notice of

the station lines, depots, rights of way and such other things as entered the physical valuation. This was in 1909.

In 1910 I was on my second year as assessor. In that year I gathered the values in practically the same manner and with similar assistants as in 1909. The total net assessment of Weld County for 1910 as I returned it to the state auditor was $14,901,970, according to the auditor's report. That was an increase of
329 $1,981,850 over 1909. In the spring of 1910 we commenced work gathering that assessment. I did not have, as I remember, any conversations with the state board or its secretary, in the spring of 1910, about amount of Weld County taxation. I had not had during 1910, up to March when I made this $15,000,000 assessment, any talk with anybody about it being low. No complaint was made in 1909 or 1910 until I had completed the assessment. About September 1st I transmitted the abstract of the 1910 assessment which showed the return of $15,472,170. I got a few days' grace, because we did not have it completed.

I know Mr. Fairall and heard part of his testimony. I saw him and the state board in October, 1910, following the transmittal of my assessment for that year. I had received a letter from the board, signed by the secretary, Mr. Fairall, stating that there had been certain omissions, and asking me to meet with them October 3, which I did. The first instance of calling me was occasioned by a complaint by a Mr. Mulford of Denver, who owned surface rights, originally owned by Union Pacific, in section 33-2-67, 3 or 4 miles west of Ft. Lupton. He contended that his surface rights were assessed, but that the coal reserves of the railroad were not. It never occurred to me that the reserves were a taxable asset in a district where coal had never been discovered, and they had never been placed on the rolls in Weld County. It was a common practice of Union Pacific to make coal reservations, whether the land was in known coal country or not. I could hardly estimate anything of the known coal reserves in the county. Mr. Mulford said he would give $20 an acre for the coal reserve and that the railroad would not sell it, and some other gentleman appeared and said another reserve was worth $100 an acre, which he would be glad to pay. This conversation referred to lands near those of Mulford. This vicinity is in some places a coal country, and is 7 or 8 miles from Erie, which is a coal camp about two miles from the southwestern corner of the county. Mr. Scribner and Mr. Holcomb were present at this meeting. I do not think they offered any objection to the taxation of these coal reserves. I asked the attorney general whether I should tax these reserves, and he said I should in the known coal belts, but not outside of them, as the reserves would have no value there.

At this time Mr. Scribner or Mr. Holcomb brought up the question of my undervaluing properties. They had a list of land transfers and the assessments, but I do not think the deeds were verified. I made no confession that the county was or that these lands were assessed low. I suggested that I would look the lands in
330 question over to see whether they were high or low. The valuation of the county was not, in my judgment low, and the

property assessed by me in previous years I would say, was not under thirty-three and a third per cent. I think we got all the property that could be returned; that was my instructions to my deputies. We tried to do everything in our power to return a fair and equitable assessment at a one-third valuation.

Upon personal property our averages were higher than any other county. We returned approximately twice as much agricultural land as any other county, and at about the same average value. I think in the adjoining counties there was not a variance of fifty cents per acre. This refers to irrigated land. I think we were higher on non-irrigated land than any other county, unless it be some of the eastern counties having no irrigated territory, such as Cheyenne, which occasionally assesses above one-third in order to get sufficient revenue.

During these years I kept in fairly close touch with conditions throughout the state, meeting the other assessors in conventions and personally. A short time after the meeting with the state board in 1910 they mailed me this list of considerations and assessments. I investigated and visited as many of the places as I could.

From my knowledge and experience I know the fair average market value of lands in Weld County; possibly not the speculative value. I found that some of the transfers in this list were trades, some of the prices had been paid owing to peculiar conditions, and some bore fictitious valuations in the deed. One tract was deeded to a party so that he could borrow money upon it. I found some of the parties were relatives, living on adjoining farms. Some of the considerations were correct, as recited in the deeds. In view of the facts I have stated, in my judgment the majority of these lands were assessed at fully 33⅓%. Through applications for rebate we found some cases in Weld County where real property was assessed at a higher rate.

After the opinion of the attorney general, in taxing coal reserves I did not aim to burden the railroad. I endeavored to make the total of assessment of the reserve and the surface rights equal the assessment of the adjoining land. We put [a] fairly good assessments on reserves adjoining mines. The others ranged from $3 to $5, some not having a great deal of coal, if any. I arrived at the assessment upon viewing and inquiry.

331 I was re-elected assessor in the fall of 1910, which was the fall in which I obtained this opinion from the attorney-general. In this fall I heard nothing further from the state board after the meeting, except [thet] Mr. Fairall wrote me a letter in reply to one I wrote relative to the assessment of the lands in the list, as Mr. Fairall testified. In my letter I only asked the opinion of the board as to whether only the instances cited should be raised, or whether the whole county should be appraised on that basis. The reply from Mr. Fairall was the only response. The board thereafter made no criticism of my 1910 assessment, and there were no further meetings, and, I think no conversation. The meeting mentioned lasted from about ten o'clock to noon. The substance of Mr. Fairall's letter was that all property assessed below one-third

should be raised to that standard. In my judgment there was no necessity to raise any.

The only difference between the 1911 assessment and that of former years was that in 1911 I cut some residence (but hardly any business) valuations in Greeley, as I thought we had had them too high.

In 1911 I received a circular letter from the state board, which I presume was sent to all the assessors, calling our attention to the agreement and asking us to make a full one-third assessment.

The 1911 assessment was $12,120 less than that of 1910. It was my purpose [*of*] cut some valuations in Greeley, as I considered them too high. I did not know what the total assessment would be until the last balance was drawn upon the abstract. In 1911 I transmitted my return to the state auditor about September 1st, the usual time. I do not recall receiving any complaint from the board or Mr. Fairall in regard to my assessment.

I think our assessment of irrigated and grazing lands and personal property was higher than in any other county. The percentage on irrigated lands was about the same as in previous years in comparison with Boulder and Larimer. Some of the southern counties, such as Otero, may have had a little higher average on their farm lands. I think the Otero average was about $25, and ours $20; but our [acerage] returned was approximately twice as much that year as returned by any other county.

In 1912 I was still assessor of Weld, and, with my assistants, made the assessment here in issue. Following my return to the auditor in 1911 up to the making of the 1912 assessment, I think there was no complaint from anyone connected with the
332 state board. The 1912 assessment was $15,421,210, an increase of $531,360, on a one-third value. This is $3,071,880 above 1908. My opinion is that land values in Weld decreased from 1910 down and into 1912.

Witness A. R. FISCHER, resumed the stand for further direct examination.

1912 was the first year in Weld County that the valuation was first fixed in total and $200 of exemption taken out. I gave the deputies instructions to assess all personal property at its full cash value, deduct the $200 constitutional exemption for heads of families, and divide by three. The former practice was to deduct $200 after dividing, which really gave a $600 exemption. The question was not raised until the latter part of 1911, or possibly in 1910. I think the deputies in 1912 followed *by* instructions. Occasionally a schedule would come in which was not correct in this regard, which we would change to full cash value, deduct $200 and divide by three. I do not know of any deviations of this rule in 1912.

The assessment of Union Pacific in Colorado was $13,183 per mile in 1912.

The 265,000 acres mentioned as assessed in Weld County in 1912 includes the irrigated land contained within the area of irrigation. This area excludes waste land or seepage and areas and

knolls whose height prevents their being irrigated by gravity. These areas and knolls are assessed at $3, $4 or $5. In some cases they have been assessed at $10 on account of the use to which they could be put, say for pasturage in connection with dairies. That 265,000 acres includes the right of way for public highways traversing the area included in the irrigated acres. I did not take that out from each farmer's land. Some railroad rights of way are included. Some people preferred to have rights of way assessed, on account of pending litigation. I think there are more railroad rights of way excluded than included.

Where an irrigation ditch runs through a farm it takes up more or less right of way for bank and ditch, and possibly driveways for the riders, although they are generally on the bank, but I do not think unless in the newer communities where the ditch rights have all been late, we have ever taken out any ditch rights; we have assessed at the same price on through either as grazing or irrigated land.

In the schedules we denominated land which could not be irrigated as grazing land. Some lands have enough water shares
333 to cover the whole area, but the ditches may not have enough water to serve all the land. In our county there is a shortage of water nearly every year in practically all the ditches.

I am familiar with N. ½ S. W. ¼ 20-2-66, having two and one-half shares of Lupton Short Line mentioned by Mr. Holcomb as having sold for $6,000. That is under the Lupton Short Line and Fulton Ditches. The Lupton shares sell for $50 each. In my opinion that land is not worth $6,000. It might be worth $2,000, which I question very much, because of the water supply in the Lupton Short Line Ditch built in 1897 or 1898, which has no priority as to river rights. My experience is that they have water not over two weeks in the early spring, which is not enough to farm with successfully. The land is a gravel bed. I do not think there is, at most, over a foot of soil on it. I think the Lupton Short Line Ditch has prior right to any ditch since built on the Platte river in our locality.

The only reason I might not have assessed the piece of land near Grover mentioned in the testimony was that it might have escaped attention, or may have been a homestead that was not proved up by April 1st, at which time the records are certified to us from the land office.

The water rights on this 265,000 acres are assessed in connection with the land. A similar practice prevails in Boulder and Larimer counties.

I should say that the average value per acre of the land included in this 265,000 acres really having water would be between $60 and $70. I did not hear the testimony of Mr. Camfield or know what he said about 300,000 acres worth $100 an acre. The assessed value on the lands I have mentioned was an average of $20 or $21 an acre being on a one-third basis. We tried and I think succeeded in making the assessment generally uniform. In some cases there might be an over or under assessment which happens in all counties of that size.

The assessed valuation of the Camfield hotel at Greeley, in-

cluding lots and building, exclusive of furniture and all other property values was $22,700, which is on a one-third basis. The assessment on the property across the street owned by Mr. Camfield, called the Farmers Trust Bank building, was $18,400, on a one-third basis.

In Weld County in 1908, 1909, 1910, 1911 and 1912 I think there has been a gradual decrease in the business of ranging and grazing cattle and sheep on the open range. It seems to me that in 1912 about 15,000 range and dairy cattle were assessed. In 1912
334 in making up the abstract we estimated the number, because we did not have an adequate force, but finally all that we did gather were fully taxed, and we taxed those cattle the same that year as in any other—actual value at what they were. I think the number of sheep assessed in 1912 was about 30,000 or 35,000.

I heard part of Mr. Holcomb's testimony about being in my office in 1909 and 1910, or 1910 and 1911. He was there quite a while in those years. I did not hear the testimony to the effect that I and my deputies induced answers when questions were propounded to people giving their taxes to the effect that they owned money and therefore were induced not to return moneys and credits. I do not remember that any such declarations were made there in the office; if there were, they were made without my consent or knowledge. No such practice was indulged in by me or my deputies. During all the time that Holcomb was there I knew his business.

In 1912 I think there were two meetings at the court house in Greeley between the county commissioners, the treasurer, Mr. Holcomb and Mr. Scribner and (on the latter occasion) Mr. Thayer. At neither of these meetings did I make any declaration that the Weld County assessment was low. I do not remember of ever making such a statement to any of those parties; I had no reason to make such a statement. I think the first meeting was in response to a letter I had written in regard to the settlement of the taxes. I think Mr. Dorsey was present that time instead of Mr. Thayer. We could not come to any agreement at all. Mr. Todd (the county attorney), Mr. Patterson and the county commissioners were present at the second meeting, and we met with Mr. Scribner, Mr. Holcomb and Mr. Thayer relative to the 1910 and 1911 assessments. We settled at 75 to 80 per cent I should say. The settlement was on a money basis and not on a percentage basis.

At the meeting Mr. Scribner and Mr. Holcomb would go out and fix their case out and the county attorney and myself would figure from our side. We had the advice of the county attorney who had taken this method of deductions upon a one-third valuation and made some of those figures; figuring over the cost of the trials and the attorney fees and those things, he said he thought we would possibly be defeated, so we made the settlement. I think that was all that happened in the morning. Mr. Scribner paid the voucher in settlement for both years. In the afternoon Mr. Holcomb, Mr. Scribner, myself and the commissioners had another discussion and I suggested a plan to make a reappraisement of the
335 county so as to get an equitable assessment from the angle of ascertaining water rights, improvements, land values and

everything else, so there would be perfect equity, and I think Mr. Holcomb suggested he would go along with his data.

I never said to Mr. Holcomb or Mr. Scribner that the 1912 assessment was low. I do not know what the commissioners said, but I did not hear them make such a statement. I had no reason to say that the assessment was low, but quite a number of inequities had been brought to my attention, and I wanted the commissioners to make a reappraisement, as had been done in some of the other counties, to the expense of which the commissioners had objected in previous years. I thought this was a good opportunity to get it before them, and I think I even asked Mr. Holcomb and Mr. Scribner to insist upon this. Up to that time I had never complained of my field force, but had complained on account of the insufficiency of my office force.

I do not think I ever told Mr. Fairall that the value of the county was $100,000,000. I might have said this in the spring of 1913, but I do not know what would have prompted me to say it. If I did say it that would include the entire assessment, corporations and everything else. Mr. Fairall and I had some discussions while I was acting with the committee of assessors, as to the policy of some new revenue laws, in the spring of 1913, and I will not say that I did not say this.

In 1912 I was conversant with the conditions in the Greeley-Poudre Irrigation District. As I remember the works were stopped some time in 1911. There has never been a drop of water to my knowledge in any of the reservoirs or system. There are bonds outstanding on these lands, but I do not know the amount. We have extended a tax of 20 cents an acre on the district practically every year I have been in office. I think this is maintenance alone, and none of it for interest. The valuation of lands in that district varies according to proximity of railroads and different soils and conditions, and is from $2 to $5 an acre; possibly some may be higher but I do not think so. These lands were the same as the range lands east of Crow Creek and north of the north line of the district, exclusive of the bond burden. The same was the condition as to the Henrylyn Irrigation District in 1912, except that we extended an interest tax on the Henrylyn for 1912. From conversation I understand that some water was delivered under the Henrylyn works in 1913. So far as I know those lands in the main are not broken. The soil in the Denver-Greeley Valley District is different
from that of the Greeley-Poudre and Henrylyn districts, and
336 there is a lot of sand. The Denver and Greeley Company has built some canals, through which they could not get water without days and days of work at this time. The condition of the Platte Valley District is the same, except that the land may be a little better than the Denver and Greeley Valley. There is a ridge of high land between the Denver and Greeley Valley and the Platte Valley District; in the neighborhood of two miles long. That range land is sandy; some on the divide is fairly good, but very little. I assessed range lands at from $1 to $6 per acre. From some standpoints the assessment was really more than one-third, although

we did not try to get it that way. $1 was our minimum assessment on any land. There is possibly some speculative value to those lands. I have never been able to find their real value for pasture and range stock, and the encroaching homesteaders and people simply filing on desert claims and fencing them have made that business practically worthless. The assessment value on these lands is as high, as if not higher than, values placed on other grazing lands in Colorado of barren character. I think it averages something over $2.

In some comparisons I made I found that the considerations recited in the deeds in the Chawks Bluff Country, mentioned in Arthur Scribner's affidavit, were practically all $10 an acre, and from my standpoint the full cash value of the lands could hardly exceed $1, $1.50 or $2. The recited considerations in township 11 north, range 65 were generally $10 an acre. I think the value of lands in township 11, ranges 66 to 62, is not to exceed $2 or $2.50 an acre. The values in township 10, ranges 56 to 67 are practically the same as this, except where there are reservoirs and springs. The real value of sections 1, 3, and 5 in township 11, range 65, is not, in my judgment, over $2 per acre. It is range land and there are no irrigation works above the land, and no feasible water supply. The recited consideration stated in Arthur Scribner's affidavit is $21,600; my estimate is $1 an acre. I have examined other statements in the affidavits covering sales of lands of like character through these townships. The consideration mentioned was usually about $10 an acre, some higher. The assessments on these lands are all practically the same. Higher assessments were made on lands belonging to Warren of Wyoming on which reservoirs or water holes were located, because they control all the surrounding lands. There are a great many instances of discrepancy between recited considerations and actual values of these range lands described in the affidavits. Pasture or grazing land adjacent to irrigated land has a higher value. Keota, Weld County, Colorado, is in the
337 midst of a prairie country. In an advertisement in the Keota News, published there the government offers the S. W. ¼ S. W. ¼ sec. 33, tp. 9, rg. 59 to the highest bidder, at the minimum price of $2.50 an acre. Another isolated tract is lots 2, 3, and 4 S. W. ¼ S. E. ¼ 5-8-59, about two miles from the Burlington Railroad near Keota, in which the same price applies, minimum $2.50 an acre. There is another one, approved by the commissioner of the general land office which is the S. ½ S. W. ¼ 9-8-59, upon which the minimum price is $2 an acre.

East of the Burlington Railroad in the north portion of the county the La Belle Reservoir has completed an inlet ditch, but I do not know of any water being in it or an outlet being built to it. I have visited in the district where some of the other irrigation works are contemplated, and have never seen any indication of a restricted flood water proposition completed or even started. The La Belle is a flood water proposition. I do not know that there is any water for it. Down the Platte the Comfield, Crow Creek and Platte reservoirs would take the flood waters ahead of it.

Range lands in the vicinity of the isolated tracts mentioned were assessed at about $1 an acre. The assessment would be higher near town sites, as near Keota and Herford, where the valuation was $2.

Cross-examination:

Weld County employed me to assist in the preparation for the trial of this case. I retired from the office of assessor January 14, 1912. Between that date and the time I entered the employ of the county I was farming, principally. My farm is near Ft. Lupton. I reentered the employ of the county about two weeks ago. I have bought some lands, but was never engaged in the business of buying and selling them. My business has been that of a farmer, and to some extent that of a dealer in merchandise. I retired from the mercantile business about January 14, 1909, when I took the office of assessor, although I still held stock in the concern. I was not a candidate for reelection in the fall of 1912. I announced that I did not desire to be nominated in the spring of 1912, possibly while making the 1912 assessment. Prior to that time I had entertained no idea of being a candidate. I was a candidate and was reelected in 1910.

I am the Fisher mentioned in the affidavit of H. C. Fairall as having attended the meetings of assessors, and also being on a committee of assessors which during 1909 sat with the State
338 Board. My name is signed to a letter or report dated July 15, 1909, as secretary of that committee, which is Exhibit B to the affidavit of Mr. Fairall, which report states, "The committee believes that the valuation you have fixed represents one-third of the actual value of public service corporations in this state." I do not know whether this was my opinion at that time, but I signed the letter as secretary. I sat with the State Board and the opinion of the majority of the committee was that that assessment was proper, and I am not going to say that I did not coincide with them, because my name is attached as secretary, and I have a very limited experience. I had some objections to the assessments made in 1909 by the State Board, but I do not know that I made any to the assessment of the Union Pacific. My objections related to other railroad companies. My opinion at that time was that the Union Pacific assessment was one-third full cash value of the property. I had gone into the matter quite thoroughly and sat with the board while they were doing their work. I had visited the property of some railroads, but we did not look at any of the Union Pacific property. Taking the method used by the State Board, I now believe the Union Pacific was not assessed at one-third of its full cash value in 1909. I have not any means of knowing outside of the tests applied by the board in that year. I do not know just when my opinion began to change; I think after I familiarized myself with several things in connection with the work in the assessor's office. The work in the assessor's office has nothing to do with the assessment of Union Pacific. I think this idea began to permeate my mind some time after the assessment; after I had made inquiries and took some in-

terest in the matters of the two assessing powers. Each power has always contended that the other was not assessing at one-third. I tried to familiarize myself with the value of corporate property. I think my opinion began to change possibly in the spring of 1910, after I had made the 1909 assessment. It may have been before I made the assessment for 1910. I cannot say definitely. I gave the matter some serious study when sitting with the State Board, and afterward, I think in 1910, when the State Board was figuring on calling the assessors together for the same purpose as in 1909. At that time I familiarized myself to a certain extent with Union Pacific values. This was by only one way, the stocks and bonds method; ascertaining the methods by which assessments were made in different states. I have access to the returns made by the Union Pacific each year to the State Board. I did not know what deductions were claimed or made in ascertaining the stocks and
339 bond values outside of Colorado. I saw the returns in this state in 1909, 1910 and 1911. I think the valuation should have been made in accordance with the provision in section 106 of the statute, which is that the share of Colorado shall be the proportion of the value of the whole system which the mileage in Colorado bears to the mileage of the whole system. I have had the idea for several years that the State Board has employed different methods for different corporations. My experience in 1909 was that if a corporation did not make the required return an arbitrary assessment was made upon it. Referring particularly to the Union Pacific, I think I have, for several years, entertained the idea that the company's property was not assessed by the State Board at fully one-third of its whole value. It has been below the valuation of the entire system, taken as a whole, in Colorado, and I have thought so. In view of this belief, the reason I have kept the valuation in my county at thirty-three and a third per cent, was because we had an agreement to that effect. Notwithstanding my idea that the railroad was underassessed, I assessed the property subject to my jurisdiction at the full thirty-three and a third per cent, to the best of my ability.

The values in Weld County have not, I think, increased since I made my assessment in 1912. They are at least no greater than they were in 1912, unless there might be some new property, which I do not think would be any great amount.

I might have stated to Mr. Fairall about January, 1913, that in my judgment the full cash value of the property in Weld County was about $100,000,000, including all property. That must have been my opinion if I said that. Around eighty or ninety or a hundred million would be right.

As to the property of Union Pacific assessed by the State Tax Commission in 1912, I made deductions which showed the assessment to be less than one-fifth, but I do not know as an average basis whether that would be perfectly right or not.

According to the abstract I made in 1912, the grand total of all property in the county was about $20,438,710, and the property locally assessed was $15,421,210, the balance being made up of

property assessed by the state Board. The total of the local and railroad assessments would be about 20% of $100,000,000, and according to that way of figuring, if the railroad property was assessed at about 20% the property I assessed must have been at about that ratio.

I should not say that a great deal of property escaped assessment; some people escaped. In making the assessment for 1910,
340 which was the first assessment I made after I had attended the meeting of this board, and the next assessment I made after I had sat with the State Board, the assessment was raised; that is, the net assessment was raised, and I think the total assessment was raised. That was not on account of additional property assessed; there was an increase in valuation in 1910, on quite an extensive valuation of property in the south end on farm lands, and I think I raised a good deal of town property in Greeley, and all the way down the river, I think, from the county line to La Salle. I think the average assessed valuation per acre on irrigated lands in 1910 was about the same as in 1909, possibly a little more. I do not remember. Possibly some of the increase may have been occasioned by bringing in additional acreage; but I went over the plats and raised land through the south end of the county up to La Salle also in Greeley and other places, where we thought it needed adjusting, to bring it up to the full one-third standard.

After I had completed my 1910 assessment I was called before the Board of Equalization in October. I was present at a meeting on October 3. A letter was addressed to me on October 7th requiring me to reconstruct my assessment and report to the board at the meeting of October 17th. I do not think I communicated with the board or appeared before it. I did not think it necessary to reconstruct my assessment, and made no changes at all, except possibly the addition of some other assessments. I made no change on the lands listed in Exhibit F. attached to Mr. Fairall's affidavit. After the meeting in October 1910, I did not raise any of the 1910 assessments in my county.

At the meeting the question was not confined merely to coal reserves. There was some other general talk. Mr. Scribner and Mr. Holcomb were there with the State Board, where they had made complaint, and cited this list of lands, which was brought to my attention then and there, and a complaint made, generally speaking, that my assessment was not high enough. It was not confined to the land of any particular coal reserves, nor was it confined to the unduly low assessments on these particular lands, but pertained to the assessment generally. The members of the Board participated in that discussion, and afterward through a letter informed me that my assessments were too low. I do not think they made any mention as to their position at that time, although there were several instances cited. I do not remember hearing Roady Kenehan saying that Assessor Sanchez was not a "marker to Fischer for low valuations." He may have said it. I do not remember my assess-
341 ment of 1909 being criticized, except perhaps by the railroad representatives. We may have had discussions.

In making the 1911 assessment I did not change my methods, or raise my assessment. The principal change was to lower town lots in Greeley, which I think had been unduly inflated. I do not know that they had been assessed high valuations for a particular purpose. I do not know, and never heard, that the Greeley lands were placed at a high valuation to permit the city to issue bonds, which are limited according to the assessed valuation. The principal change in 1911 was to lower town lots in Greeley outside of the business district. The business district was assessed the same as in 1910. I decreased the total net assessment in 1911. In 1910 I did not change the values per acre on lands, or values per head on live stock. Outside of the personal assessment on live stock, which had the full cash valuation, I deducted $200, and divided by three, there was no change that I know of.

I think there was a lowering of land values to some extent in 1911, and any increase was caused by additional acreage coming in from homesteads proved up. I do not know that there was much increase in the personal property.

I have pursued the same method in all the years I was in office respecting the obtaining of the descriptions and the valuations of lands and personal property. We used field men entirely, who were the same men each year, when we could obtain them. They were sent out to gather what information they could in regard to property so as to make the proper assessment. We gave them as a guide the plats each year showing the irrigated and grazing land and price per acre in each farm (except that in 1912 we took off the acres, leaving the price what it had been), but they had the option of raising the price per acre; they were to adjust it. I think in some instances they made it more acres; I do not know specific instances where they made the values higher than had been indicated. I would indicate on the plats, and did in 1912, the assessable value per acre of the irrigated land, and the assessable value per acre of grazing land, in each farm. I think they generally followed those figures. In 1912 I took off the figures showing the proportion of irrigated to grazing land, which they were to ascertain. This change was simply to introduce new methods in the office. I do not know that I thought the county had been getting the worst of it in this respect,
but I wanted to get every irrigable acre. My judgment is
342 that we got all irrigable land, whether actually irrigated or
not. I have no means of ascertaining except from the reports the field men brought in. I gave instructions to this effect.

The field men took schedules with them to present to the people they saw, which were brought back and filed in my office. A great many of them were signed. I examined a great many of them. I regarded it as my duty to pass judgment on these valuations, but the field men were sent out to get the data in respect to lands farmed. I instructed them to have the schedules sworn to. In a great many instances this was not done but I accepted the schedule. There are always from forty to fifty per cent of the schedules unsigned, because the taxpayer lives out of the county. All I had to guide me was simply the schedules handed back to me by my field force

and the statements contained in them as to the acreage in a man's farm which was irrigable. I did not go over all the schedules, but went over as many as I could. I did not visit the farm. I do not think it is and has been the practice of farmers to return land as irrigated only when actually that season in crops. I have no means of determining on every farm, because I could not visit it during the crop season. These field men are employed for about thirty days, are paid four dollars a day, are actually my deputies, and take an oath. They resided in the district in which they were to make the assessment, so that the people whose property they were to assess were friends or neighbors of theirs. Each man had from one to ten townships, depending on the [*population.*] They resided in the district assigned to them. They were instructed to ask every question on the schedule. In 1912 we had a standard printed form of schedule. I think the State Board approves these for the State. I have not here any of the forms. I think the schedule marked "G" by the stenographer, returned in 1912 for the Eaton Electric Company, was the standard form employed by us in that year.

The questions which I said on direct examination I instructed the deputies and assistants to have people answer were as to personal property, particularly. We required the assistants to get the description and allowed them to put the price per acre and the acres, then the description, agricultural or grazing, and the amount, and the school districts, and those questions, and then the full amount in the questions of personal property. I do not know whether they ask the questions printed under the heading "Interrogatories" [*on the*] of each schedule. I think we have several of those filled out, at least one year we did. The oath was to be administered. The
343 schedule requires the signature of the person making the return and requires it to be sworn to, if he can be found. I did not put anybody under oath and make any inquiries in addition to those on the schedule, as may be done under the statute. I did not in 1912 nor any year I was assessor put any one under oath and ask him questions about his property, under the inquisitorial power provided in the statute. I did not in 1912 nor any year I was assessor take any statements under the statute which provides that those who make a claim of deduction on account of indebtedness from what they have in the way of moneys, notes and credits, including moneys in bank, shall give a detailed statement of the indebtedness under oath. $18,940 possibly may have been all the bank deposits assessable in 1912. I ascertained this by the questions in the schedule. I think I asked everybody I have ever taken a schedule from, but we never asked anything except what appears on the schedule. We never used any of the other blanks. I never asked any question, not on this schedule, as I might have done, about bank deposits. I did not know that the average bank deposits in Weld County for the year preceding April 1, 1912, approximated $3,000,000, but I knew there was quite a number of deposits. I could have found that out by going to the banks. They also publish statements. I did not take any steps to find out about this, as I thought we could find it out from the schedules, by asking the ques-

tions. The discrepancy may have been represented by [decuctions] for indebtedness. If a man had $50, $100 or $1,000 in bank and was using it for checking purposes or in business, or merely borrowed it, I would not take that into consideration, because I do not think he owned it, because his being in debt would off-set his credit. This is my understand-ng as to the question of the average amount of his bank deposits. The statute provides that we cannot allow a man a credit for an indebtedness unless he makes a list of the debts in writing and swears to it and files it with me. None of these things were done at all. When my deputies came in with their returns showing the total [banks] deposits to be about $18,000, I accepted that without question. The schedules for 1912 showed the amount of money credits, book accounts and other accounts not evidenced by writing to be absolutely nothing. I did not know that this could not be true in Weld County in 1912; I would assume that any condition would be true. The 1910 and 1911 crops had practically failed in the Greeley District, so far as potatoes were concerned. There were some beets. The farmers became borrowers, borrowing from the bankers, possibly. The farmers became indebted to the stores for their supplies, and the merchants to the
344 banks. I cannot tell what became of all the creditors. Evidently the questions were asked — answers returned. Under those conditions it was not surprising to me that in Weld County [in] was impossible to find any credits, book accounts and other accounts not evidenced by writing, which were assessable. The amount of the debts owned by farmers must have been a great deal. I know the storekeepers borrowed money from the banks to carry the farmers and I think they owed the banks a great deal of money in 1912. The banks possibly may have held notes representing that money. "If the farmer owed the merchant, and the merchant in turn owed the banker, along about the same lines, if that farmer owed him, that indebtedness would be practically off-set, as I take it." I instructed my deputies to get this information, but I did not instruct them to take from any one any statement of his indebtedness in writing, under oath. I just instructed them to talk to these people. I do not think the deputies ever returned any written statement of indebtedness at all in any case, except in one or two instances they may have made some report of written indebtedness, but not on a separate blank. There is no place in the schedule for a statement, under oath, of the items of indebtedness. Nothing of that kind was done, and the total amount was shown only in a very few instances. With this knowledge I accepted the returns and made the assessment, without taking into account any of these moneys, notes, credits or evidences of indebtedness. There was a considerable amount of credits, a great amount, which I would not attempt to state. These I did not assess.

I did not find any notes, bonds, debentures, or any other written evidence of indebtedness. The amount of capital invested in manufactures is not shown on my abstract. I think this amount should have been bracketed with the amount invested in merchandise. In taking off the abstract the amounts employed in manufactures

and merchandise would be added together. It would be pretty hard to ascertain what the distinctive items are. In this particular I did not return the abstract of assessment in the form required by statute, but it was accepted. It is customary to bracket some of the items. There is considerable capital employed in the county in manufactures. The Great Western Sugar Company had a number of factories there in 1910, 1911, and 1912. There is one at Greeley, one at Eaton, and one at Windsor. There are great sums of money invested in that process of manufacture in my county. I made a total assessment of about $600,000 on these three factories. Merchandise and manufactures of an average value of $85,000
345 show on each of these schedules. Because these items are listed together is one reason we could not segregate merchandise and manufactures on the abstract. My total assessment of $600,000 on these factories included everything. I do not know that these factories cost not less than a million dollars a piece to erect. The Great Western does business in several counties. I did not make their assessment upon a stock and bond basis, and did not take that into consideration at all. I assessed only the tangible property. I understood that the [ststute] required me to assess the intangible value of a corporation doing business in two or more counties. I have never ascertained whether my assessment would have been higher if I had done this. I used the same method of assessing the Great Western in 1909, 1910, 1911 and 1912. I assessed only the tangible property of corporations which came under my jurisdiction.

I question very much whether the assessment of 1912 was one-third of the value of the property of The Eaton Electric Company, The Ft. Lupton Light and Power Company, The Greeley and Denver Railway Company, and the Home Gas and Electric Company. I assessed the Ft. Lupton Power Company; The Greeley and Denver Railroad Company and the Home Gas and Electric Company have their property in Greeley, and I think I personally assessed those companies. The property of the Denver and Greeley Railroad Company was in plain sight and the Ft. Lupton property was located where I lived. I think that the assessment that was taken on the Ft. Lupton property is erroneous. The net valuation which I placed on the property of these companies as it existed in 1912 covered all of the property they had at the time of the assessment, according to my judgment. I do not know that I took any steps in 1912 to find out what property they had, although I had an interview with Mr. Farr, of the Eaton Electric Company, in the year previous, and Mr. Allen, of the railroad Company, in making those assessments. I do not know whether I required them to file schedules or not. I think I attended to these particular assessments myself, and I may have made these assessments without getting any return whatever from these corporations, especially in regard to the street car line. I think my deputy took up the Home Gas and Electric. We very frequently made assessments without any schedule returned, even where the people were in the same town; we could not get

them in the office, and did not go to see them, as we were always busy. This occurred in many cases.

I do not think I said in direct examination that we took schedules in every instance except when the man was out of the state or county or could not be reached, because there is a number
346 of schedules all through the county which we did not get in and signed, even though the people lived in the particular community because we did not go to see them. A couple of these public utility corporations had offices. I do not know that the Greeley street car lines had, but Mr. P. W. Allen represented it, and he had an office. We took the matter up with the street car people in 1911, trying to find out their approximate value, and the assessment in 1912 was on the same basis as in 1911. It was the practice very frequently not to require any new return in the form of a schedule. Exhibit G, which purports to be the schedule of the Eaton Electric Company, is not signed by anybody, even the assessor. The assessed valuation on this schedule is the same as I made it. I was thinking that the assessed valuation of the Ft. Lupton Power Company appearing on plaintiff's Exhibit C might be wrong. The other assessments appearing there I take to be correct. This list on plaintiff's Exhibit C embraces all public utilities in Weld County which were assessed by me in 1912, and which were assessed by the State Tax Commission in 1913, except The Greeley Gas & Fuel Company. I do not remember what my 1912 assessment on that was. Of the schedules of these various public utilities for 1912, only one, that of the Gas and Electric Company, is signed. The rest are unsigned, either by the person whose property is assessed, or by the assessor. I take it that this one (indicating) is meant to be sworn to. There is no signature there of any officer before whom the oath was taken. I would take it that the Home Gas and Electric Company schedule was made up in the office. This other one I would say was taken up with Mr. Fitch personally in the office, and the other may have been made up in the office by the field force, without anybody being present. It was a very common practice in my office to make up schedules in the office and not have anybody sign or swear to them. We made every schedule of real estate and personalty that was not returned to us, without signature. In the main we tried to get as many signatures as we could. I do not suppose we made any effort to get to these large utility corporations, having fixed places of business. We made no effort in the case of any corporation in Weld County to get a stock and bond value, or intangible value, for the purpose of assessment. I learned that the statute provided for that a little bit late. I do not know whether I learned that in 1911 or 1912. At one time I did not know of the statute, and never followed it.

Every year I was assessor until 1912, I first ascertained what I deemed to be a one-third valuation of the personal property and then deducted the full amount of $200 for the exemption.
347 I changed this scheme in 1912. The number of exemptions for heads of families in 1912 was about the same in 1912 as in 1911. There had been a decrease from 1909, I think. It

was my effort to assess property in the county at one-third of its cash value.

I construed that there must be and show a $200 exemption in each case entitled to an exemption. The only just way to get at it would have been to assess the property at full cash value, giving a $200 exemption, which would make no difference in the number or amount of exemptions in 1912 from 1911.

The total net amount of my 1912 assessment was $15,421,210. The total gross assessment, before making any deductions, was $15,941,810. Therefore the amount of deductions was $520,600. This gross assessment of $15,941,810 was based upon one-third of what I deemed to be the full cash value. I claimed that we had to show the $520,600 of deductions upon the abstract of assessment, so in doing this it was not a third valuation we took this $520,600 from. But I do not think my sworn abstract of assessment, filed with the State Tax Commission, is incorrect. The total net assessment in the county for 1912, $15,421,000 taken from the total gross assessment, $15,941,810 leaves the amount deducted on account of exemptions, $520,600. According to my return for 1911, which is Exhibit F of plaintiff's Exhibits, the amount of deductions on account of the $200 exemption was $512,800, substantially the same as the total deduction in 1912, the number of exemptions allowed being practically the same in each year. In 1910, as appears from Plaintiff's Exhibit E, the amount deducted on account of the exemption was $570,200. Therefore, the total amounts deducted on account of exemptions in each of these three years was practically the same, and the number of exemptions allowed practically the same. But I absolutely changed my method in 1912. All the figures on my statement to the Tax Commission are correct. I can demonstrate that the exemption for 1912 would be the same as in previous years, notwithstanding the changed method, in this way: Take this instance where the full cash value is $21,000. "Unfortunately for me, we don't take that exemption; we could take the $21,000 and carry it down here and divide it by three, which makes $7,000 assessment. If those $200 are to come off here, we would still get this full cash assessment; still the exemption would be exactly the same as it was the year before; we could only deduct $66⅔ from this original amount."

We could not deduct $66⅔ from the full cash value. To make
348 the deduction from the full cash value we would have to deduct $200 in each instance, "which we did, and it shows on the abstract." If we made [th*d*] deduction from the one third of the full *each* value, the amount of that deduction in each instance ought not to be one-third of $200, because we could not "deduct from a schedule and then in an abstract make it a third of $200." It does not appear that I have deducted the full amount of $200 for each exemption from a gross assessment made by me upon a one-third basis, in 1912, "although it is made in the same way, but the assessment was not made that way." I do not want to be understood positively that that does not show upon the face of it, "but I am saying that my assessment—that my property in that county was listed at a full cash value of personal property; that the $200

was exempted and divided by three." I think Exhibit B, which is my abstract filed with the State Tax Commission for the year 1912, shows such a condition as this although I cannot tell.

Among other things taken up at this meeting in October, 1910, with the State Board, was the question about the assessment of coal reserves. I afterwards made an assessment on coal reserves, but did not assess all the coal reserves that belonged to the Union Pacific. I assessed a great many which had been reserved by the Union Pacific in the coal regions. I tried to make an assessment for coal values under adjoining lands. In my opinion those were absolutely correct in 1912, although I am not positive about that. These Union Pacific coal reserves are under odd-numbered sections, which have been deeded by the Union Pacific from its grant. The interspersed even-numbered sections are owned by others than the railroad. If there is coal under one section there possibly would be coal under the adjoining section. In making the assessment on these adjoining even-numbered sections we tried to make an assessment on account of the coal values. The Union Pacific is assessed $5 an acre for its coal reserve, and we assessed the surface rights at $5 an acre, which would make a $10 assessment on the odd sections, and we tried to get the $10 assessment upon the even sections, which would carry both values. In 1912 I think we had this adjusted fairly well. We did not have it adjusted as well in 1911. I think this was done fairly well in 1912, but I do not know that it was done as well as most of the other assessment work.

After this list of property was furnished in 1910 which the State Board said was under assessed, I took some steps to ascertain as to the correctness of this statement. In some cases I went to the grantors and grantees or had them come into the office, or talked with [*the*] over the telephone. In this way I investigated ten
349 or fifteen instances out of the list. Out of this ten or fifteen I found that in four or five, or possibly more, instances the amount stated in the deed had been paid. The others were trades or something along that line. In some other instances I went to see the property personally. In these cases what I relied upon was my judgment as to the value of the land, without any regard to whether the statement of consideration in the deed had actually been paid or not. It would have made a very inequitable assessment in case I had used a valuation of $22,000 for one eighty, and the next maybe a $7,300 assessment, as against a [$4,000*0*] or $5,000 assessment on the next eighty, which had the same rights, same water and same land. In my 1912 assessment I was guided rather than by what I thought the land was selling for, by what I thought it was worth, what the income might be, and other conditions surrounding it. I understood that the statute required me to value property at its fair market value. I do not know what the term "market value" means. Possibly what somebody who was very familiar with the country and its location would give to somebody else, also familiar with it; not any freak sales as between friends or relatives, or trades, or what might be a fictitious consideration in the deed, or things of that character. In the instances

I spoke of as verifying the considerations recited in the deeds, I certainly did not pay any attention to what had actually been paid; that might be one element, but I did not take it as an entirety. What some people are willing to pay for land does not make the market value, which is the measure of the assessment.

I have stated that my judgment is that irrigated lands in Weld County are worth, in 1912, from sixty to seventy dollars per acre as an average, including water rights. I have made no efforts to assess water rights only in connection with the land. For instance, certain land is assessed at $40 on a third valuation which would be practically worthless without water rights. I question very much whether land under a ditch is worth more than land not under a ditch, if [*if*] has not any water rights. I have followed this *principal* in making my assessments. Unirrigated land might be worth more in connection with an irrigated farm. A man whose land is under a ditch might buy or rent a water right for it. It is obvious that land under a ditch, even though it has not at that moment water rights, is worth more than land which is above any ditch and can never be irrigated. In making my assessments I do not think I treated land under a ditch which did not have water rights at the time as being of no more value than the land in a district where there is no ditch carrying water and never can
350 be; I might have done that in irrigation districts. The difference in value between land under a ditch which has a water right and land under a ditch which at that time has not a water right is merely the purchase price of the necessary water right. There are water rights for sale in Weld County. There is considerable trading and dealing in them in connection with land. I never hear of any otherwise. There may be a few rights that could be bought or rented. There are water rights of such a character that they may be dealt in separate and apart from the land. I never tried to find out whether there were any such water rights that did not happen to be attached to any particular land. The statute says that water rights must be assessed as improvements. I did not assess water rights separately as improvements, I think the statute places them in the enhanced value of the land. I do not think very many water rights escaped assessment in this way. The water rights are used in irrigating 265,000 acres, and there would not be very many left.

There was plenty of water in 1912 to irrigate all the lands under most of the ditches. That was a good year for water in Weld County. All water rights were not of equal value from the value standpoint. Each man may have got a good deal of water from the rainfall.

The way I got the average on range lands was to bunch the prairie lands in the north and east corners of the county with the lands excluded from irrigated farms. I cannot tell which of the lands in that class stated in my abstract, constitute acres excluded from irrigated farms. Where a ditch would cut 160 acres in two, we would exclude from two to eighty acres. Whatever those exclusions were, they all went into the general class "grazing land." We put a higher valuation on lands in irrigated sections, but ex-

cluded from the irrigated farms, than upon strictly grazing lands at a distance from the irrigated sections. Where the assessment was over $10 the land went into the classification of irrigated lands. The classification depended on the amount of assessment.

At the meeting which occurred at Greeley April 30, 1912, I made no statement that the assessments of 1910 and 1911 were low. The county attorney thought we might lose the case then pending on account of exemptions. I do not think anything was said about values. The reason I urged upon the county commissioners, and asked Mr. Scribner and Mr. Holcomb to [*to*] urge upon the county commissioners that a more careful assessment be made for the next year, or furnish me with means to make it, was that I wanted
351 to get a perfectly equitable assessment throughout the county.

We had numerous complaints and I thought, to take into consideration every element, we ought to have a new appraisement, like the other counties had been doing. This could have been used also to find omitted property. This may have been embraced in the discussion. I urged that the new appraisement be made because I did not think one man can equalize without some discrimination in a county like Weld. Possibly I told the commissioners this. In view of the help I had and the data, I said I thought it necessary to make a new assessment. I had urged the commissioners in the previous year and the year before to give me some additional field help, which they did not do. In 1911 I urged having appraisements made over the county. This is field work. I wanted to take only men who were qualified and competent real estate — and contractor-, and make an assessment and catch anything that was missing. I do not say that I believed my deputies were not competent, but I believe three or four or five men would have done much better than one man. Along these lines additional field help would have been an advantage. In 1911 I asked the commissioners to give me three men to make an appraisement, with whom I might go along. This was more an index for the office. I wanted to get an accurate system in the office. The commissioners did not give me the necessary funds. The method I suggested has been used by Larimer and Adams counties, adjoining us.

The work was stopped on the Greeley-Poudre Irrigation district in the spring or summer of 1911. In my judgment the fact that the work had been stopped had no particular effect on the value of the lands in the district by April 1, 1912, because my theory in making assessments in the district was from the beginning that they would never build the system and get water. I think most of the lands were owned by the same parties previous to this time. Some Eastern people and the promoters might have thought this system was going to be built. I am not aware that there has been a very large number of transfers of land in the Greeley-Poudre district. I think that anybody who bought lands in the district had something "handed" to him, and made my assessment on this basis. If I had to take over the lands, I would say they are worth less than nothing, because they are burdened with an outstanding bond issue. I gave them a fair value, just about the same as the best in

the same close proximity to the town. It has a branch railroad running over it, and a little more intrinsic value than some of the rest of the land.

352 I presented a newspaper here that had an advertisement in it about some excluded lands, which were offered for sale by the government at auction, on which a certain minimum price was fixed. These sales were to occur in 1913. I take it that an "isolated tract" is a tract in a district where everything else has been taken up; that is, there are no other government tracts adjoining it, I have no idea what these tracts sold for if the sales have been made. I was just giving an idea of the minimum of the lands.

A. R. FISCHER on further cross-examination.

In making the assessments for 1911 I decreased valuations somewhat in Greeley. As a general thing I do not think I increased valuations in 1912. The total assessment for 1912 was about half a million dollars larger than it had been in 1911. This was possibly accounted for by additions in quantity and numbers of things, and there may have been additions of new land coming in that had been proved up by homesteaders. I would say that the majority of the increase arose from property assessed in 1912, but not in 1911.

I have never had a great idea of the value of the lands in the Greeley-Poudre Irrigation district. The land is just as good as there is in the county. The objection is that there is no water to irrigate with. I kept the values down, because it is a grazing land proposition.

I remember when the Union Pacific built branches which are known as the lines east of Greeley, in 1910. They start from the main line a short distance above Greeley at a point called Greeley Junction, one branch extending to a place called Briggsdale, a distance of about twenty-six miles. From that branch another branch is taken off at Cloverly, which extends generally in a northerly direction to Hungerford. I have been out there since [there] railroads were completed. The majority of them are in the Greeley-Poudre district. There is some country between a point a little beyond Gill, (which is eight or nine miles from the Junction) and Greeley Junction which is irrigated without regard to the irrigation works being built by the Greeley-Poudre District. There is a little irrigated territory from Cloverly up four or five miles, which amounts to about one-third of the branch. Before these branches were built, the irrigated territory had its transportation facilities in the form of the old line of the Union Pacific. These new branch lines were in the year 1910 dependent for their earnings

353 almost entirely or at least to a very large extent, upon the products of the soil in the Greeley-Poudre Irrigation District. I think the total length of the branches is about forty-three miles. Unless the Greeley-Poudre Irrigation District is a success and produces crops, the traffic over these lines will be very little in that vicinity, and I imagine is so now and has been since they were opened; so that the value of these lines outside of the irrigated territory is to a large extent dependent upon the success of the Greeley-

Poudre enterprise, and as profit-producing properties they are, in my judgment of very little value at this time. In making up my mind about the value of the Union Pacific property in Weld County I did not take this fact into consideration, but the whole system, located in every state where it runs. I entertained the same opinion about the value of lands in all other irrigation districts in Weld County as I have about the value of the lands in the Greely-Poudre District, except the Green City Irrigation District. I think they are getting some water there. That is a district of very small acreage in the easterly or southeasterly part of the county, along the Platte River. In all the other large districts I regard the land as being of no value except as grazing land, practically.

The Great Western Sugar Company has three plants in Weld County and has had for several years. That is a large corporation, and has outstanding issues of stock. It has plants in Sterling, Brush, Morgan; I think it has in all nine plants in Colorado. It owns all the factories in northern Colorado, and buys the beets raised for making sugar in that region. I have heard that this company pays dividends, but I never made any investigation about that. I never made any investigation to determine whether they accumulate any surplus from their earnings. I do not know that I ever tried to find out what its stock is quoted at. I never made any effort to find out what the output of its factories in Weld County in 1911 or 1912 was, or the value of it. I do not know how many beets were treated at its various factories in Weld County. I did not make any investigation at all to determine anything about the business of the Company, or its value as a profit-producing plant, or the value of its stock, or anything of that character. I think the company returned a schedule in 1912. I talked the matters over with Mr. Egil, the manager, at that time, especially in regard to the personal property, such as automobiles. I think Mr. Egil was manager of all the plants in Weld County. I did not ask him any of the questions about stock values, or surplus, or dividends, or earn-
354 ings, or expenses, or operation. My only effort was to make an assessment upon so much of its physical plant as was located in Weld County, that is, the physical tangible property. This was the same theory and same effort I made in respect to all other corporations which did business in Weld County and were subject to my assessment, except that I may have assessed some franchises, by which I covered intangible property, which would appear in the assessment abstract under the heading "Franchises." I assessed no intangible value outside of the franchise.

What is meant by the County Commissioners granting rebates is reductions made by the commissioners upon complaint of taxpayers that their assessments were too high. The commissioners sat as a board of equalization. I do not know of any instances where they lowered the values found by me for 1912. I do not know of any time in 1910, 1911 or 1912 that the commissioners undertook to equalize by raising any values. A rebate is made where an erroneous assessment has taken place year after year, where the taxpayer complains that he did not own the property, and such in-

stances. We have had very few instances of these kinds. Many of the complaints were that the property was assessed high, and if any action was taken by the Board on those it was upon the theory that the assessment ought to be less, so it amounted to the reduction by them of the assessment. There were quite a number of applications for rebates. They were not all granted, but in cases it was found that the property had been erroneously assessed, or assessed too high in comparison with the rest of the county, they were granted.

I think the condition I have described in Weld County whereby the farmers became indebted to the store-keepers and to the banks has been general since I have been in the county. I presume the majority of the farmers at some season of the year go in debt to the bank, for carrying [in] their business. In 1911 and 1912 the banks and tradesmen extended credit to the farmers to a greater extent than in previous years, and were carrying them until they should get a good crop.

I think that in my abstract of assessment for 1909 the item of $52,430 was bracketed to cover the cash value of bank deposits in the state, cash value of bank deposits out of the state, and also the amount of money, credits, book accounts, and other accounts, not evidenced by writing, and also the cash value of bonds, promissory notes, debentures, and all other written evidences of indebtedness.

355 In 1910 I found no deposits unless under the same conditions; so far as appears from my abstract I found none whatever. In 1911 I found bank deposits to the extent of $17,750, and in 1912, $18,940. In 1909 the item of money, credits, book accounts and other accounts not evidenced by writing was lumped with the other three items mentioned by me and a total value given $52,430. In 1910 I found, according to the abstract, money, credits, book accounts and other accounts not evidenced by writing to the extent of $54,270. Possibly this item should be bracketed, but it does not appear so in the certified copy in evidence, so I am not positive. In 1911 I found a separate item for [bank] deposits, but found nothing whatever as the amount of money, credits, book accounts, and other accounts not evidenced by writing. Perhaps these items should have been bracketed with bank deposits, in which case the total for all would be $17,750. I do not know whether this is the case, or whether I found that amount for bank deposits alone. The abstract shows $17,750 for bank deposits. If this is the case, I do not know how the shrinkage in bank deposits from $52,430 in 1909 came about. In 1912 under the item of amount of money, credits, book accounts and other accounts not evidenced by writing, according to the abstract I found nothing whatever. I suppose all these items of moneys and credits, bank deposits, etc., were lumped in the one sum of $18,940; so this $18,940 returned as bank deposits in 1912 was intended to cover not only bank deposits but all these other items of money, credits, book accounts, promissory [note-], bonds, debentures, and all other written or unwritten evidences of indebtedness. There was no shrinkage from 1911, but very much from 1909 and 1910. 1911

and 1912 are the years when I said there was a large amount of indebtedness in Weld County.

In 1909, as appears from the abstract, I found the number of clocks and watches in Weld County to be 181. The population in that year was about 30,000. I would say they had more, a great many more. In 1910 I found [*that*] number of clocks and watches in the county to be 203. I would take it there were more than that. In 1911 I found the number to be reduced to 125. I could not say what I thought had become of the other clocks and watches there had been before. I know that the 30,000 people in Weld County had more than 125 clocks and watches. I probably knew that when this assessment came in to me for examination, and before I extended it on the roll. In 1912 I found the number of clocks and watches to be 147 less than in 1909 and 1910. I knew at the time there were a great many more. Weld County is one of the most prosperous agricultural counties in the state. The farmers are rich
356 enough to have clocks and watches. There are a number of prosperous towns in the county, including Greeley, with a population of about 8,000. In 1909 all the jewelry, gold and silver, diamonds and other precious stones which I found amounted to $600. I knew that there were some diamonds in the county, but to say that there [*were*] more jewelry, gold and silver plate, diamonds and other precious stones would be very much of an estimate. I found this item to be $3,800 in 1910. The deputies may have found more which had been in the county in previous years. I do not know that $3,800 is a ridiculously low assessment for this item on a one-third valuation. In 1911 I found this item to be $840. My [*suspicious*] were not particularly excited when the deputies reported that this was all they could find of the $3,800 returned in the previous year, and I considered it not at all significant. I do not know that this is a ridiculously low assessment, on a one-third basis. I do not know how many diamonds there are, outside of what were returned to us. I could not personally visit every man to find out these things. If I had any reason to believe that anyone had anything of this kind I could have called him in, put him under oath and made him testify. I never did this, but only asked the questions on the schedule. Whatever anybody said to my deputies I accepted without question. In 1912 my assessment on articles embraced under the heading "Jewelry, Gold and Silver Plate, Diamonds and other precious stones," was again $840, precisely the same as in the previous year. I did not observe that the figures were the same, and would not have investigated if I had.

Referring to Mr. Fairall's affidavit and Exhibit F thereto, containing the list of lands referred to by the State Board when they directed me to readjust and raise my values in Weld County: After the meeting with the State Board in October, 1910, I went back to the County and checked up as many of these transfers as I could. I cannot state from memory exactly which ones, but I remember one or two. I checked in as many cases as I could get into communication with the parties. I put in possibly two or three days in this checking. I first had to get the names of the owners from the tax

roll, check them from the schedules, and those things. I verified eight or ten transfers out of the entire list. I verified these eight or ten by either getting the parties in the office, going to see them, [of] phoning them. I do not think I could name these eight or ten from the description on this affidavit, there being no names. Out of this number there were some trades; in one case a deed had been given a man so he could borrow some money on a piece
357 of land; and some of them were between families who were trying to locate in close proximity to their family. I do not remember a specific [instances] where the grantor or grantee stated that the consideration in the deed had not been paid, unless in the case of trades. In the case of a trade, I went no further than to ascertain that it was a trade; I do not think there was very much real value attached. I cannot state from memory how many of the eight or ten were trades; I do not know that there was any considerable number. In making selections to verify I tried to get people who were close. If I had ascertained in respect to whether or not in the deeds the sum mentioned in the deed had actually been paid, I do not know that it would have made any difference. One quarter might be sold for $4,000, and one adjoining being practically the same land, with same water right, for $8,000; the consideration would not be a guide for those lands. While I was assessor, including 1912, I did not investigate the question as to how much people were paying for lands in various parts of the county, because I did not have time to take transfers off the record; the transfers on record were open to me had I had the time. I never looked into the question as to what lands were selling for, only what I might read. We fixed what we thought were fair values upon lands, without regard to what they were selling for. We valued all grazing lands the same.

I helped make and agreed to the settlement with the Union Pacific for the taxes of 1910 and 1911 in April 1912. Prior to that time the list of transfers in Exhibit A to Mr. Holcomb's affidavit filed in this case, which had been also filed in the suit then pending had come into my possession.

I think the county still has a copy of it. I never made any effort to verify any of these transfers, and paid no attention to the list in this Exhibit A. At that time, in April, 1912, I was engaged in making the assessment for 1912. The showing in Exhibit A did not particularly impress me, and I paid no attention to it whatever.

I may have omitted in 1912 to assess the Ft. Lupton Light and Power Company at all and may have passed the roll on to the Treasurer, where he put it on as omitted property. It may have been at my suggestion that he put it on. The Ft. Lupton Light and Power Company has its property at my home town. It may be true that there is property I did not get on the roll at all 1912, but I do not recall such occurrence. I would not say that this is not so.

358 I turned over the 1911 tax roll to the Treasurer late in December, or early in January of 1912. From this time to April 1st I may have had time to check over transfers of real estate as appear upon the county records, and chattel mortgages and this

list of transfers I had in my possession which is Exhibit A to Mr. Holcomb's affidavit. I did not care to do this, and do not think I had time; I do not know that the idea ever occurred to me. I did not think these things amounted to anything; and think I told them during the period we were arguing in the commissioner's room in regard to sending out a staff of deputies or appraisers, that I did not care to go into a dry territory at all, because it would not change my assessment one way or another. The sale considerations recited in deeds would not have made any change in my assessment in dry lands. I did not make any effort to verify the transfers.

Redirect examination:

All personal property was assessed at full cash value, the $200 exempted, and divided by three to get the net assessment. The abstract carries the net assessment as returned by our books and is on the tax roll of Weld County, but we had to show the total exemptions to be $520,600. The abstract shows values at one-third, but shows the exemptions to be the full $200.

The exemptions taken out from the assessment in 1912 were absolutely different from 1911. In 1911 we assessed all personal property at one-third, and deducted $200 from that one-third to get the net assessment. In 1912 we changed the method and assessed all personal property at full cash value, deducted the $200 exemption and divided by three to get the net assessment. It might appear from looking at the schedule that there was $520,600 deducted from the net assessment. We had to show the amount of these exemptions at $520,000. We could not show them at one-third of $520,000 because on our schedules they appear as $200 each, but they were taken from the full cash assessment and then divided by three. The net amount extended for this levy was $15,421,210. Some assessors were taking $67 from a one-third valuation, and I took the stand that I wanted my schedules to show that we did give the $200 exemption. We arrived at the net assessment from the valuation that is upon the tax rolls after we had deducted $200 from the cash assessment and divided it by three to get the one-third assessment, so it would have been merely a figure of taking $520,000 and deducting it to show the number of exemptions to which the county was entitled. No taxpayer got more than
359 the $200 exemption. The property of a taxpayer in excess of $200 worth exempted was assessed at the rate of one-third The levies which were extended and the burdens they carried based on this fact, as to each taxpayer. The abstract, which is plaintiff's Exhibit B, is absolutely true as to its recitals concerning the exemptions and as to the total net assessment. When we assess at the full cash value and divide by three, we get more value than we would of we divided the other way, because that would be giving an exemption of $600. It makes no difference as to the amount paid by an individual taxpayer, who has claim of $200 exemption, as to what we put in the abstract. According to the agreement we could not report the specific items at their full cash value, because we could

not put those on the assessment roll. We might have taken the items according to the cash value of the schedule, then deducted the $520,600 and divided by three, which would give the same result, but we did not do it that way. The Total net assessment for the year was $15,421,210. It was merely a matter of form, showing the exemptions, which we had to do according to the abstract. There were more exemptions in 1912, than in 1911. In 1911 the exemptions of [$512.00] were deducted from the total valuations as fixed at the one-thir rate, and in 1912 the total deductions of $520,600 were deducted from the total valuation at one hundred per cent of its value. The abstract does not seem to me to contradict this fact. I do not know hardly how to explain it.

FRANK W. WYLIE, a witness on behalf of respondents, testified on

Direct examination:

My name is Frank W. Wylie, my place of residence is near Platteville. I have resided there almost twenty years. I am a farmer. While residing there I have become acquainted with the different characters of lands and the different ditches that are used for irrigation in that vicinity. I have been acquainted with the relative water rights of the different ditches and their opportunity to take and distribute water for the service of lands lying thereunder for their irrigation. I have been secretary of the Farmer's Independent Ditch for about thirteen years, have had more or less dealings with the different ditches, and have been very well acquainted with the farmers. I have been over the lands under all the ditches in that vicinity, and have traveled to the east over the prairies beyond the ditches. Platteville is on the east line of the irrigated country.
360 All east of that is sandhills, in the vicinity of Platteville. Those sandhills extend five or six miles east of Platteville.

I am acquainted with conditions as to irrigation and what lands are and are not fitted for irrigation. I know the relative value of the different characters of land for irrigation in that vicinity, and have had some acquaintance over the county. From my experience I know something about the return values of lands in the Platte Valley when properly irrigated. There is not much result when they are not irrigated. In valuing lands in the Platte Valley, say from the southern boundary of the county to the mouth of the Poudre, it is necessary to consider the sub-soil, which cannot be seen from the surface by casual observation, the amount and regularity of the water supply and the seepage. The conditions as to seepage change in different years. The market value of land would vary very much in different localities, but considering all the circumstances I can state what it is. The market value of Weld County land the county over, where there is a sufficient water supply would average between fifty and sixty dollars an acre, including the water rights and improvements.

During these twenty years I have every year been engaged in the tillage of lands by means of the water supply, and have been on one of the ditch boards, so that I am acquainted with the facts concern-

ing the old and late priorities of ditches fairly well. The land which I farm is four and a half miles north of Platteville, and is under the Farmers' Independent Ditch. I have been a deputy assessor in my community for about ten years. I did not assess in 1907, 1908 and 1909, but have the preceding and following years. In 1912 I assessed township 4 north, 66, 3-66, and I think the third township was 3-65.

Before I began my work I had conferences with the county assessor. In as much as I understood the rules from previous years, I do not think he was specific with me in 1912, except as to the mode of deducting the $200 exemption. In previous years we had valued at one-third and then deducted the $200. In 1912, the exemption amounted to $200; under the old practice we figured it was about $600. In 1912 we first took the full valuation of all the property, then deducted the $200 and divided the remainder by three. A person having the same amount of property in 1911 and 1912, and entitled to the exemption, would pay more tax in 1912 than in 1911.

Each year Mr. Fischer tried to impress on us to get all the property we could for taxation. In ascertaining the taxable property of individuals within our territory we had on our schedule the
361 articles we were to assess; we would ask as to these articles, and when we found anything not listed we wrote it in blanks provided, or sometimes averaged it up with some of the other property, if the amount was small. In my case I knew most of the individuals and most of their personal stuff. We asked as to the different articles and if we had any doubts as to truthfulness, we asked further questions, and looked around. I think we got a very large proportion of the taxable property. People would sometimes keep out a cow or horse or some little article which we couldn't always see. When I knew or learned that anything had not been scheduled, I would get the taxpayer to increase the list, or report it to Mr. Fischer. When we found a piece of property owned by a non-resident we generally made out a blank schedule of our own. The amount of lands of each individual sometimes deviated from the former amount, and we checked up and determined these matters.

I think very little irrigated land escaped assessment in my district. I tried, and think did assess real estate at a full one-third value.

We asked as to diamonds, clocks, watches, gold and silver. I did not in a good many instances, because I knew they did not have any. I have never found very much fancy jewelry or clocks and watches among the farmers. I do not know of any watches or clocks in my district worth on a third valuation as much as ten dollars. Most of the watches could be bought for five or six dollars, and most of the clocks were cheap alarm clocks.

We were instructed to make our assessments so that the figures would end with a cipher. It required a great deal of work and amounted to very little in the end to carry decimals over. We did this is such a way as not to exempt anything, sometimes bunching without listing a watch, clock or other article with what we are assessing to make such an amount. I think we made a very fair assessment. There was no purpose on my part or on the part of the other

persons making this assessment, so far as I know, to exempt any property, or over-burden any property.

I think I worked on this assessment about thirty days, all told. If we did not find a man at home, sometimes we left a schedule for him; and if there was any great change in his property, we invariably wrote out a schedule of our own, without his signature.

In cases where I knew people had no money and had a mortgage on all their stuff I did not ask the questions about moneys
362 and credits. A great many people had mortgages on their property every year. The number was not so different in 1912 as compared with other years in our district as it was in some others, because we are in the potato belt. The potato blight of 1912 had an effect toward depressing the worth of potato lands. I think the amount owed by the people I interviewed was about the same as in the two or three preceding years.

Where I thought people might have money I asked for their moneys and credits. With the exception of probably half a dozen people in my territory I think the answers were invariably that they did not have as much money in bank as they owed. They invariably had two or three hundred dollars for immediate use. I found a large number of them owing the banks. Most of the farmers, including myself, have borrowed money every summer from the bank. That is the customary necessity.

I am acquainted with the country east of Platteville and the sand-hills and sand dunes in Beebe draw, and East of Platteville, east of Evans No. 2 ditch. That is sometimes called the Platte Valley or the Old English. After you pass the English ditch, east of Platteville, the ground is very sandy, in places is almost pure sand, and is covered with sagebrush. There is a little sand grass good for cattle, but when they break up that sand and break that sage brush, it blows very bad. There may be a little of the land under the Speer on the upper and lower end fitted for irrigation, but the middle section is very poor. If it is attempted to run water through that canal to the lands at the lower end, there is quite a little seepage in the sandy land. It is pretty hard to run water a considerable distance through it at all. If the land under the Speer canal is broken up, the values decrease, because it is not good pasture land and is too blowy for farm land. If there was enough water I do not think enough could be run through that ditch to use the land. I once crossed the Speer canal in the spring. The ditch was level full of land. The lands above the Old English Ditch half a mile east of Platteville on eastward to and across the Beebe Draw, which includes lands under the Speer, have been settled on by quite a few homesteaders, which has ruined the cattle industry. I do not think the full value of this land exceeds $3 or $5 an acre. I assessed one section which was all this kind of land. I assessed all of this at $3 an acre in 1912. Some had been assessed at $2 and some at $3, and Mr. Fischer and I thought it ought to be uniform, [*at*] it was practically all alike. This was on a one-third valuation. I think this land was in 4-65 or 3-65,
363 and some in 3-66. The assessment was more than one-third of the actual value, but at the time they were figuring on this ditch, and were selling for a little more than [*than.*] I did not

think it was worth it, but Mr. Fischer thought it ought to be assessed at $3.

Most of the lands under that ditch are still in a prairie state. There are a few homesteaders, there, who have broken up a few acres and planted them to dry-land crops, mostly corn, but this does not prevail to any great extent. I think there has been a little more water in the ditches in this district this summer, and possibly a little last year but not to any extent to raise crops. The ditch may have been cleaned out and water run past the point I crossed; I could not say because I have not been there.

I think the school land is rented at 6c. an acre for that which is grazing land and 25c. an acre for that which is agricultural. Land within or near irrigated territory, but above the ditch or unavailable for full cropping, was assessed as grazing land. It was assessed a little higher than the same class of land outside of irrigated territory. I always thought that this land was worth more in conjunction with a ranch.

In making the assessment I knew most of the land personally, and knew all the ditches and water rights; we took that into consideration. We took the different kinds of soil into consideration, and also the proximity of the land to town or to a railroad, and what the land would raise, also the gravel beds and subsoil, marshes and seep. In some cases seep improves, and in other cases ruins land. It would be hard for a stranger to value irrigated land, being unacquainted with the ditches and subsoil. At times the poorest of this land looks as good as the best.

Cross-examination:

I was deputy assessor for a long time. I have at the same time been a farmer. I settled in the locality of Platteville in February, 1892, coming from Pennsylvania. I acquired my knowledge about Weld County lands outside my neighborhood driving over the county, noticing the different crops and talking with the different people. I never tilled lands in other parts of the county. I know what lands sell for in other parts of the county only through hearsay; I have been more or less interested in the whole county and interested to know which was the best part.

364 The Mr. Wylie who was the assessor prior to 1908 was my brother. He was assesser for seven years immediately preceding Mr. Fischer. I was appointed seven, eight, or nine years after I settled here, by my brother. Three years I did not assess. I was deputy water commissioner, in 1907 and 1908 I think it was.

The district I undertook to assess in 1912 covered about three townships, embracing my own farm. I do not know the population of these townships. The town of Platteville was included in them, and I took schedules there in 1912. No other assessor took schedules in these three townships. I cannot say how many schedules I took. I had a plat describing all the lands in this territory. As to personal property, we had no knowledge as to the number of people in this district. Most of them reside on some of the lands described. And in two we followed the streets. I know nearly everyone in town. I

think most of the people in these townships are my friends. I cannot state at all how many people lived in the three townships. When I have spoken of "we" I have meant the different deputies. I did not have any of them with me in my district. We met at different times and talked over the work. I only know what the other assessors did from what they told me. My own practice was to call on the people through my territory, carrying the forms of schedules with me. I wrote them out myself. In questioning taxpayers, if they were land owners, I took the land first, then I started at the top of the column on the form of schedule and asked each question. I asked each person whether he was the owner of the place, unless I knew, in which case I did not ask. I wrote down a description, always asking how many acres of agricultural land there were. Frequently I explained what was meant by "agricultural land," always doing so if requested; sometimes they needed no explanation. If they wanted an explanation I told them agricultural land was anything embraced in the raising of crops—wheat, oats, barley, or alfalfa; everything except meadow land, which we call wild or native hay. What I meant by agricultural land was land in crops. In one or two years we classified meadow land as farm land, but in most cases it was given a different valuation, and on the schedules for some years there was a place to list it. I told taxpayers that I meant by meadow land, land on which they cut native hay of any kind. Most of this land would be under ditch, but the kind of land which is not irrigated, as a rule. In some cases it may be irrigated, in some cases not; whether it could be or not it was classified as meadow land. The price would be between that of agricultural and grazing land. In some years
365 we had three classifications of land; in other years we would take the aggregate and average it. In all years we had the classifications of farm and grazing land. In [this] years I think the only classifications were agricultural land and grazing land. In this year sometimes we placed this in with the grazing land and sometimes with the agricultural. In most cases I think I placed it with the [agrucultural] land. I did not always accept what the farmer told me about those acres. I think I myself knew most of the farms, within a few acres. My aim was to include in "agricultural land" what was farmed, and this meadow land, if it was good. Sometimes there is meadow land which is very poor. Sometimes we would raise the price of the grazing land and put that all in as grazing land. I never took anything out of the agricultural lands for buildings and improvements. In most cases the unfarmed land was not farmed because of an insufficiency of water; lands of this character were classified as grazing land.

I suppose by "lands under ditch but above the ditch" Mr. Tew meant a high point between which and the ditch there was a very low depression. I do not think there is very much of that in my district. In most cases we assessed land of this character as grazing land. I ascertained the acreage by personal inspection, if I did not know it, and in some cases I guess we took the man's word for it. In most cases I knew pretty nearly myself.

As to personal property I did not ask about each of the items on the schedule, because I knew the stock of some of my immediate

neighbors about as well as they did; in other cases I asked. In the majority of cases about the only thing to do was to take the man's word about it. I am referring to all the questions on the schedule. I do not know that we always read the oath, but I invariably mentioned to taxpayers that they were under oath.

A very large proportion of the schedules returned by me were signed and the taxpayers understood they were making oath when they signed.

In most cases when I got through with the questions on the schedule, I asked the taxpayer if that was all the taxable property he had, to the best of his knowledge and belief. In some cases I made investigation to determine whether the answers were true; if I thought a man was dishonest, I did. I have friends who are not honest.

366 I do not know of but two or three farmers with bank accounts, except what they have for immediate use. I do not think any of them would have money in bank this fall, if they had any in the spring. Not considering the question of immediate use, I think most of them had bank accounts. A great many of the people in Platteville have bank accounts. I returned some, but not much, in my district on account of moneys in bank or moneys, notes and credits of any sort. In speaking of a man not having a bank account, even if he has money in bank in the spring and not in the fall, I mean that he expects to use that money within a short time to pay his debts. I think his debts ought to be off-set against his credits. When a man said he had money in bank I would generally, but sometimes did not, take it down, but in most cases he would say, in reply to the question as to whether he had money in bank, "Yes, but I have more debts than I have money in bank," or "I have borrowed money and given a note for it." I would then let it [got]. In some years, but I do not think in 1912, I took written statements from them as to their indebtedness, showing the items. I presume that when they signed the schedule they were swearing to the information that they had given in regard to the off-set. The information I got on that subject was exceedingly general. In some cases I asked people whom they owed money to, or what the items were, or what form it was in, when I had doubts, but this would be the exception rather than the rule.

I am familiar with sections 16 and 36, township 3-66, which is school land. I do not know that section 16 was appraised at $15 an acre and section 36 at $30 an acre by the state on January 9, 1912. The character of that land would be very sandy. Some of the immediately surrounding lands are of the same character. This is a spotted country, and varies a good deal in a short distance. Some of these farms in this vicinity which have been farmed for years and manured and alfalfaed do not blow so bad. I do not recall what I assessed the land surrounding section 36-3-66 in 1912. I am fairly familiar with N. E. ¼ section 16, township 3-66. I do not remember exactly without the plat. I do not know that this was sold May 4, 1910 at a price of $21.75 per acre. If the land surrounding is grazing land it was assessed at $3 an acre. I think I

assessed all grazing land in my jurisdiction at $3 an acre in 1912. I am not sure whether I assessed 3-65 in 1912 or not. I did not intentionally assess at $2.50 on an average in 1912 the lands surrounding section 36-3-66. There were a good many non-
367 owners there, and in making those assessments, those that I assessed personally I changed the assessment to $3 and made a note on my plat. This may have been overlooked in the office.

I am familiar with S. W. ¼ sec. 30, tp. 3, rg. 66, sold by A. Wiggum to D. Black, February 21, 1910. I do not know whether Mr. Black paid $4,500 or not. I cannot remember what I assessed the property. It was from $5 to $7, probably. I do not think I assessed there in 1910, but I think I did in 1912. I may have assessed that tract, including improvements, at $580, which would be a little over $3 an acre. My impression was that it was assessed at something like $5, but if it was assessed at $3.50 this was enough, because in my judgment all those lands were assessed too high. I do not remember whether I assessed improvements there at $100. There are not many improvements. There is a small house, which is old and has been repaired two or three times, then there is a small very poor stable. I do not know whether the windmill was there when the assessment was made or not. I do not know how many rooms there were in the house. If there is also a three-room house it is very small. I think there is a small outhouse of some kind.

I do not know N. ½ S. W. ¼ sec. 20-2-66. I did not assess that.

FRANK W. WYLIE on further

Cross-examination:

In part of 1912 I owned a farm in these townships which I have described. I still rent the farm. I think I ceased to own this farm in December, 1911, on January 1912. This farm is 4½ miles north of Platteville, in tp. 4, range 66. It is W. ½ S. E. ¼ of 30. It was foreclosed under a mortgage. I think some of the help in the office wrote up my schedule. Including water rights and improvements. I would say this tract was worth from $60 to $70 an acre. I had ten shares of Farmers' Independent, and six shares of Boulder and Weld Reservoir stock. The mortgage was about $5,000, with accrued interest. I did not borrow that much on the property, but I had borrowed some money from the same party afterwards. I thought it was worth $60 or $70 an acre, but I could not sell it for that. I also owned a portion of S. E. ¼ sec. 28 in that township. I have a brother owning a piece of property, which is east of section 30, adjoining Gilcrest. I do not know that he was there when I assessed that, but I appraised a valuation on it. The property was in 1912, worth from $50 to $60 an acre. I think I assessed
368 it in 1912 at about $15. He then had under construction a pumping plant, which has made it worth a little more than then. It may be that I assessed 100 acres of the tract, there being 103 acres in all, at $12 an acre, three acres at $3, and the improvements at $200. I am familiar with the land immediately adjoining that of my brother on the east, in section 28, township 4, range 66,

owned by a Mr. Oster. The E. ½ S. W. ¼ 27, also owned by Mr. Oster, I think is similar; it may be a little better, some may be poorer. I think spots in it are seeped some. In assessing E. ½ S. W. ¼ of 27, I made no exclusion on account of any non-irrigable land, unless I just averaged it in taking the total value, which we sometimes did if it was not entirely waste land. I think Mr. Oster's land is all irrigable, but I would not call his water right very good.

I do not remember what I assessed E. ½ S. W. ¼ sec. 27-4-66. We aimed to get them nearly the same. They may have varied two or three dollars. That would be an 80 acre tract. I think I assessed that 80 acre tract at a valuation of $12 per acre in 1912, with $150 for all improvements. I think Mr. Oster bought E. ½ S. W. ¼ sec. 27-4-66 from a Mr. R. S. Forrest. I do not remember when he bought it. I do not remember whether he paid $10,000 or not. He bought some farm machinery, wagons, horses, etc. I think he told me he paid no cash down. I do not know whether the deed was recorded at the time I made the 1912 assessment or not. I did not look up the record. In making the assessments I never looked up the records to see what the transfers had been. I sometimes took prices into consideration, but the price varied so much that they cannot be taken as an absolute guide. In Mr. Oster's case I would hardly call that a bona fide sale, because at the time he was very much in debt outside of the ranch, and I do not think he paid practically anything down on the place. I made a distinction between paying cash and giving security for deferred payments, unless the security is equivalent to cash.

In 1912 I assessed townships 4-66 — 3-66, and either 3-65 or 4-65. I do not think I made any assessments at less than $3 an acre in the schedules I wrote. There were some lands owned by parties who did not reside there, and I think I made a note; I know I spoke to Mr. Fischer about making them up at a valuation of $3. If I assessed 3-65, and if of the land assessed over 13,000 acres were assessed at $2, 1,034 at $3, and 320 at $6, I do not think the figures would be changed after they left my hands. In one year (I am not sure whether 1912) we did not have the number of acres farmed on the plat. I aimed to arrange the figures and description on the
369 plat so that in writing up foreign assessments they would note them on the plat. If land appears assessed at $2 an acre in these townships, I suppose I did not make the assessment or else the figures were changed after they left my hands. I am quite sure I assessed township 3-66. If a large number of acres in that township were assessed at less than $3, the only way I can account for it is that it was in the case of foreign residents whom I did not see personally, and through some error in the office or error of mine the assessment was less than $3. On improved farms, or where there is personal property, we generally make out a blank schedule of our own, without the owner's signature, but in cases of this kind, where it was all grazing land, no improvements, and no personal property, we would generally make a note on our plat that the assessment had been raised. I suppose that is making an assessment.

We can find the land, even if the owner is away. If a large quantity of land in township 3-66 is assessed at less than $3, I suppose somebody else did it. I might have overlooked making a $3 assessment in some cases, but I do not think in very [*man*].

I do not know that S. W. ¼ N. W. ¼ sec. 11-4-66, which is one of the townships assessed by me, sold on June 30, 1909, for $4,000. I do not know whether I assessed it in 1912 at $120 for land and improvements. I do not know that sections 1, 11, and 13, tp. 3-66, sold on December 31, 1909, for over $24,000. I could not say whether my aggregate assessment on those three sections in 1912 was $3,840. I always priced land by the acre. I do not know that N. ½ S. E. ¼ sec. 7, 4-66, sold on May 21, 1910, for $5,500. I do not know whether I assessed it in 1912 for $800. I know nothing about and paid no attention to these sales.

I do not think a large number of other tracts in the township which I assessed sold at figures from five to eight times as great as the assessment, in bona fide sales. I never heard of any that came that high. I heard of sales, but never investigated them. I did not look at the records to see what the deeds were, or who the parties were, or what the purported consideration was. I never tried to investigate and verify any recited considerations.

Redirect examination:

Secs. 1, 3, and 13, tp. 3 N., rg. 66, near the Milton reservoir, section 3, containing what is called the old English reservoir,
370 are familiar to me. In 1912 it did not have a value of $24,000 for farming purposes. Section 1, above the reservoir is range land. Its value would be greater if there were more grazing land contiguous. I should say its value would not exceed four or five dollars an acre. Assuming section 3 to be all grazing land, section 3 would be worth no more. Sec. 13 in the same township, above the reservoir, is similar; all three sections could be used only for grazing. I do not think a value of $24,000 could be put on the three.

I know 4-66 and also sec. 7 in that township. I think part of that section is seep water. That is under the Western ditch. There was nothing remarkable about the assessment of $800, including improvements, on N. ½ S. E. ¼ (indicating on map.) Sec. 1, tp. 3 N., rg. 66, is above the English ditch. This land might be touched by the Platte Valley system (the Speer Canal), which has no water. Sec. 11, adjacent is in the sandhills. It is all range land; it had not been irrigated when I was there a year ago. The Speer Canal goes through section 13. The land from the Speer Canal falls to the east toward the Milton reservoir, toward the bottom of Beebe draw. That is still prairie country in there, above the Speer Canal. I do not think those sections had any value except for grazing in 1912. I do not recall the different pieces of property without being on the ground. I do not know who owns the S. W. ¼ of N. W. ¼ of 11-4-66.

In making my assessment I included the roadways occupying parts of taxpayers' property. I did not exclude any of the taxable

area because occupied by improvements. I made no exclusion because of ditch rights of way, except in a few cases where the owner made an objection.

I lost my farm. I think it and the eighty acres adjoining it on the east are considered the best eighties in that immediate vicinity. I worked on it continuously during these years. I was born and raised on a farm, and think I know how to farm. The mortgage on my farm was foreclosed last December or January. I still occupy the farm as a tenant. I tried to sell my place through several different parties whom I knew to be selling land. I did not exactly list it with any real estate agent. I spoke to Mr. Arbuckle, of Arbuckle and Purcell, and he did not think he could sell it for cash; he said he might trade it. I was unable to sell the place. I wanted $6,000 for this eighty acres, which is about $75 an acre.

Recross-examination:

My property was assessed at $15 an acre in 1912, without improvements. I do not think the improvements were assessed as low as $250, my impression being that the assessment was $400 or $500.

371 W. S. DECKER, a witness on behalf of respondents, testified:

Direct examination:

I live at Ft. Lupton, and have resided in that vicinity for 26 years, I am now and for about four years have been in the produce business. I have a farm in that vicinity, and am acquainted with the character of lands in the Platte Valley under the ditches in and about the vicinity of Ft. Lupton. I know the lands to the east of the irrigated territory, and the lands upon the west side of the river. I am acquainted with the condition of the irrigated lands in that vicinity not adjacent to the Platte River. Generally, I am acquainted with the dates of priority of water rights of the different ditches diverting water from the South Platte river for irrigation in the vicinity of Ft. Lupton, and so know the relative rights and priorities of the ditches and irrigation works so used. I am acquainted with the values of land in that vicinity, what they will return, what they sell for and all the circumstances surrounding their worth. I knew the market value of lands with water and of taxable property in the vicinity of Ft. Lupton in 1912. I was one of the deputies assisting in making the assessment in 1912. I have been a deputy only under Mr. Fischer acting in 1910, 1911 and 1912. In 1912 I assessed three townships; 1-67, 1-68 and 2-68.

A considerable amount of the property assessed by me west of the South Platte is in an irrigation district, which takes water from Standley Lake. That is a new country. It was formerly a range country, but a part of it is farmed now, although the major part is still range land. Last year was the first year we got water through the Standley system. With plenty of water it takes two or three years to make prairie lands valuable for farming. Last year they did not have plenty of water for that land. This year they had a

comparatively good run; I think two-thirds of the season; from Standley Lake. All the lands under Standley Lake are not yet broken up.

I made my assessments on a one-third valuation. In 1912 we deducted the $200 exemption from the full valuation of personal property, and divided that remainder by three. The two preceding years we deducted the $200 from one-third of the value.

In making my assessment I personally visited every piece of property in these three townships. I interviewed every taxpayer I could find. I do not know that I read the questions on the schedule to everyone, but did to most of them. The first question
372 was the number of irrigated acres. The schedule classified lands as "Agricultural," and "Grazing," and I think in 1912 there was a classification "Natural Hay Land," I made full inquiry of the persons whose schedules I took. I asked them if they had given the correct amount of their property, and if so to sign the schedule.

I was acquainted with most of these lands before making the assessment. In determining the number of irrigated acres in each piece I had to rely a good deal on what the man said. I could judge by looking it over but had no time to measure it. I think the schedules I secured were as correct as anyone could get them. I did not go by the statements of these persons alone as to values. I took a good many things into consideration. The first one would be the irrigation ditch the land was under; also the closeness to a market, either where there might be a switch along the railroad, or a beet dump, or something of that kind. I assessed the land above the ditch as grazing land, at a different valuation. I found a good deal of land in the bottoms of the St. Vrain (I think in 2-68) which was alkalied or seepage. I do not think a person could very well estimate the values of lands under ditch without a personal inspection. I think it takes a lifetime for a person to become conversant with all the different conditions concerning these irrigated lands to make a proper estimate of the values. Good irrigated land sometimes becomes worthless by being over-irrigated or by water raising up from the bottom, unless it can be drained. Some of the land in the St. Vrain bottom is so flat that it is almost impossible to drain it. I do not think these conditions are apparent to a person not conversant with the practice of irrigation. The value of these lands increases after the first year after the construction of a ditch carrying water.

I got the number of live stock as nearly as I could at the homes of taxpayers. I changed some of the values given me. One man said he had three cattle, but I afterwards found he had sixty more, which I also listed. I listed such stock as I could find in my district.

I read off the questions in rotation. I asked the questions as to moneys and credits and the debts off-set by them. I acted under instructions from Mr. Fischer, which were to get all the property in my territory, and I got everything I could find. In the case of non-residents I marked "Non-resident" on my map, getting the person's

address, turning that in with my return as to what the person had.

373 I was somewhat acquainted with the value of non-irrigated lands beyond the ditches and to the east of the irrigated territory adjacent to Ft. Lupton. I should say that the value of range land or grazing land above the ditches, or under ditches which have not yet obtained or carried water to the land, is from five to ten dollars an acre. I assessed some of that kind of land, in the vicinity of the Standley, in 1-68. Land is assessed at from $3 to as high as $65 on a third valuation. The land assessed at $3 is in the vicinity of the new Standley system, on the west side of the river. The land on the east side of the river is perhaps more sandy than the land in the St. Vrain.

I am acquainted with the land north of Hudson, in the Boxelder country, which is a good deal on a sandy order. The land right in the Boxelder Valley would be good for irrigation, but the sand would not be.

The land in the vicinity of my property, (which is in section 22, township 2 north, range 65), in the sandhill country, is worth $10 an acre. It is close to the irrigation country. The land in my own part of the country I class at $5 an acre. I think the land under the ditch is worth as much as it is as it would be to have water in the Standley system. For instance, my land is not bounded; if it were I would consider it worth less than it is now under the ditch, although I have no ditch stock. In the sandhill country the land under the ditches, subjected to a bond burden and with a water right, is worth less than the land not burdened but under the ditch, because no man can pay out on that indebtedness on 160 acres of dry land. He has to have a good farm somewhere else in order to pay out and make his living. The soil of this particular land is not fitted for irrigation. I do not think they have a very good water supply there. They have not shown it yet; the lands under these ditches have not been supplied with water; that is, the good lands on the west side or the lands which are unfitted on the east. There is one ditch in the valley west of Hudson which has water, that is the only one I have known that has had. This land just west of Hudson is of a better quality than the general run of the land under those ditches. The land for a mile and a half to the west of Hudson, in the Beebe draw or in the valley, is harder soil, better soil. Outside of that, the whole area in there is of the character I have described.

374 Cross-examination:

I am a produce dealer at Ft. Lupton. I also own 230 acres in section 1, township 1, range 66. My home place, consisting of 80 acres, is in the northeast quarter. The rest of my land is south and east of this, in S. E. ¼ of sec. 1, and in southwest quarter of sec. 6, 1-65, the township line passing through my land. My land in S. W. ¼ 6-1-65 is being farmed by my son. I do not live on it myself. I have owned part of it about ten years and eighty acres of it about five years. I have rights to Lupton Bottom water and

Brighton Ditch water for it. I have sufficient water to irrigate all the land. There is a five-room frame—log, old house—on the property, and barn and sheds. I also own S. E. ¼ 22-2-65, which is grazing land, with no improvements or water rights. I own some town property in Ft. Lupton, and an acre tract just outside of Ft. Lupton. In the sandhill country under the Standley system the land is worth less now than before the works were constructed. This is confined to a particular part of the country, and is on account of the character of the land there. The value of the land, except as to that sandhill country, might have been improved when the works were constructed, but if a man were bonded and were compelled to stay in that district, these last two years, there would not be much left of him, because they have had no water; he has had to pay interest on the bonds or lose his land. That sandhill country is not included in the Denver-St. Vrain district, in the southwest corner of the country; I am speaking of the land east of the river

I tried to assess property at one-third of its value. The water rights principally made the value of the land, and I did not pay much attention to the market value. I suppose market value would be what anything would bring when well advertised, and not at a forced or auction sale.

I have never dealt in lands in Weld County except those I have owned myself. I have never dealt in lands in my own neighborhood except those I now own. I have not paid much attention to what lands were selling for in that vicinity. I do not think I took that into consideration, unless it was right where I lived; I did not take any trouble to look up the record of any property. I just ascertained what I thought was the value, without any regard to what lands had been selling for recently in that neighborhood. I never took any pains to ascertain what they had been selling for. Of course, near where I lived I heard what the considerations were. I never ascertained as to these three townships.

375 I think I assessed the property which I found and did assess at one-third of its value.

There are no questions on the schedule. There is a list of articles and different kinds of land. By asking the questions I mean asking about each of the items on the schedule and asking the taxpayer to sign it.

I am pretty well acquainted in the three townships which I assessed in 1912. I am not so well acquainted with the people in 1-68 and 2-68. I have become familiar with what property they have from living in the vicinity. If I did not know a man I would have to take his word as to his property. I did take the word of a very large number of those people for what they had. In the instance where the man told me he had three head of stock and I saw sixty in the field, he did not tell me the truth. I did not see any more instances of that character. There were no others where I went back afterwards to make investigation. In the vast majority of cases I just took the word of whoever I were talking to as to the property, and what I could see around the premises. I did not go over his farm in each instance.

On the question of excluding acres from irrigated lands I had to take the word of the owner.

I read the oath to some of the people, or asked them to read it before they signed, in some cases; I could not say how [man-], not very many. As a rule I would just ask them to sign the schedule, and they signed it. The oath was not read to or by very many of them.

As a matter of fact, I was hurrying through with this work because it was a large job for a man to do in a short time.

I have asked people about their bank accounts. Very few told me they had a bank account.

The only towns in my district were the mining towns of Frederick and Dacono. I found no one in these towns having a bank account. I did not ask a good many, if they did not have anything. I found very few having any bank account. I think I returned a few bank deposits on the schedules I sent in. A good many people said they owed at the bank, instead of the bank owing them. This information was given verbally and not in writing. They gave no details as to the bank they owed, or the form of the indebtedness, did not write it out and did not swear to it. The reason I did not return bank accounts was because people said they were indebted.

I do not think I returned any moneys, notes and credits other
376 than bank accounts, evidenced either in writing or not. This was because people said they were indebted for more than other people owed them. I did get that from them in writing or under oath.

I think I got practically all the property of the residents. As to non-residents I made a notation on my map, got their address, and turned it in to the assessor. I did not assess their property. I gave the assessor the description of the property, and any improvements and their value as nearly as I could get it. I did not put any value on the land, but let the assessor do that. There is a considerable quantity of land in those three townships owned by non-residents, probably a third.

I assessed some land as high as $65, which is near the Puritan mine. That is coal land and was assessed as such. I think it belonged to the Union Pacific, but I cannot remember now.

(The witness here erroneously describes his property, correcting on page 655.)

I bought 150 acres nine years ago for $30 an acre, and I do think it is worth less now.

My land is (indicating on map) N. W. ¼ N. E. ¼ of section 1, and N. E. ¼ N. E. ¼ sec. 1, and S. ½ N. E. ¼, and 40 acres in the township immediately to the east, being S. W. ¼ N. W. ¼ sec. 6, tp. 1 N., rg. 66. This 40 acres is bottom land in the river, for which I paid $30 an acre, along with the balance of that 160. This 40 is pasture land, except five acres. I suppose it is now worth what I paid for it. It is assessed at $3 for 1912.

About 60 acres of my property in sec. 1, tp. 1, rg. 67, which adjoins this 40 acre tract immediately upon the west, is meadow

land; the balance is wet land, pasture land. I have water rights for it, but do not irrigate it, because it is too wet. I raise native hay on it without irrigation. I do not know what its value is at this time. I have nothing on that place except fences. I have altogether 230 acres. I do not know that this is assessed, 60 acres at $20, 50 acres at $3, 30 acres at $20, and 44 acres at $3. I did not assess it. That land is worth a great deal more than that. I paid $67.50 for that 80 acres north of there.

I am not familar with land sales made by the State of Colorado in the townships which I assessed. I do not know that in April, 1910, S. E. ¼ sec. 36, tp. 1, rg. 68, was sold at $30 an acre. I know it was sold, but I do not know at what price. It was my understanding that the man had not received a deed to the property at the time of the 1912 assessment.

377 I do not know that N. E. ¼ sec. 16, 1-68, was sold by the State in April, 1910 at the rate of $22.50 an acre. If the lands immediately surrounding the school section in 16 are grazing land, they were assessed at an average of $3 an acre in 1912. I assessed nothing less than $3. The lands surrounding this piece may be of the same character. There is no ditch in there. I assessed on this side (indicating on map). This part of my farm that was put in at $20 an acre adjoins that 36—this 50 acres that is put in at $20 an acre. Some of the land adjoining 36 is put in at $20 an acre, but I do not know what the average was.

I could not say whether I am familiar with N. E. ¼ sec. 2, tp. 1, rg. 68 or not. I assessed that in 1912. It may belong to a Mr. Graham, a non-resident. I did not know that in August, 1909, he bought N. E. ¼ sec. 2, tp. 1, rg. 68, for $14,500. I did not know that that was on record, and that he had actually paid that for the land. I never investigated to find out. If Graham is a non-resident, I did not assess this property at $1,500, or at all. I could not say whether I assessed this property or not.

CHARLES H. WAIT, a witness on behalf of respondents, testified on

Direct examination:

My name is Charles H. Wait. I live at Roggen, in the southeastern part of Weld County, in what is called the range country and in what is sometimes termed the sandhills. I have lived there over twenty years, engaged in stock-raising. I have a ranch of about 10,000 acres. This land is not under any irrigation works or fitted for irrigation in the main.

In 1912 I was one of the deputy assessors in Weld County, assessing six townships in the vicinity of Roggen. I am acquainted with the market value per acre of the grazing lands in that vicinity. I think the townships I assessed were (correcting descriptions given on page 660) townships 2 and 3 north, 61; 2 and 3 north, 62; 2 and 3 north, 63. As grazing land that is worth from two to three dollars [*on*] acre. I base that conclusion on the earning value in grazing cattle. I have been in that business there during all the years I have mentioned. Cattle is the livestock I graze there. I have made some

figures and estimates to determine how many cattle and horses this grazing land will sustain and from these I have figured what amount of interest can be obtained from the use of the lands for that purpose, at six per cent.

378 I bid in at the capitol at $22 an acre N. E. ¼ 36-3-63, described in affidavit of J. U. Harris. The reason I made that bid for the land was that at the time the Denver Reservoir and Irrigation Company was on a deal to buy our ranch and were proposing to extend their irrigation system to include this land, and it was right in the center of my ranch and near my home ranch, and near the railroad. I paid the first payment in 1909. I never paid any more but forfeited the land to the state when the Reservoir and Irrigation Company went into the hands of the receiver. I now rent the land at 5c. an acre. I rent any amount of state lands in that vicinity, and I do not pay over 5c. an acre for any of it. This is a fair rental. Some lands there are owned by so-called dry-farmers or homesteaders. I have obtained the use of some of this land, never paying any cash rental but simply taking care of the farmers' improvements. I do not know the rental per quarter usually paid homesteaders.

I am acquainted with the value of section 36, township 3, range 63, listed in the affidavit of J. U. Harris as having sold at $22 or $26 an acre. That is the section of which I bid in one quarter. The actual value of that land is about $3 an acre.

I know sec. 12, tp. 3, rg., 63, stated in Mr. Harris' affidavit to be school land and to have been sold for $10 an acre in 1910. The purchasers only paid the first payment, abandoning the section. The value of this land is about $3 an acre.

I do not know W. ½ S. E. ¼ 23-4-61, stated in Mr. Scribner's affidavit to have sold March 20, 1913, for $2,500, and assessed at $420. I know the character of the land around it, which is grazing land and sandy. Assuming it to be grazing land, it is worth about $3 an acre.

I know very well N. E. ¼ 10-3-63, stated in Mr. Scribner's affidavit to have sold November 15, 1911, for $1,500, and assessed at $320. That is sandhills, and worth $2 an acre. There is not and not contemplated any ditch near it.

I am not well acquainted with the ranges to the north of the irrigated district in Weld County. My acquaintance is mostly in the southeastern portion of the county, south of Platte. The land above the ditches which have water is from $2 to $3 an acre.

I made the assessment in 1912. I interviewed so many of the taxpayers as I could find in the township I have mentioned. As to personal property, I asked all the questions on the schedule,

379 according to my instructions, put down the value of the property, deducted $200, and then divided by three. This was my practice in all the instances. My only means of inquiry was to ask the taxpayer. I knew as a general thing that the stockmen had considerable and the dry farmers did not have very much, a large proportion of them not having enough to put them in above the exemption, in which case, I made no report at all. I asked these dry farmers the questions as to bank account moneys, credits, gold and

silver plate, and put down the answers they gave me. I did not look for any gold and silver plate anywhere.

Cross-examination:

The territory I covered in 1912 is rather sparsely settled. The district I covered was twelve miles one way and eighteen the other. I do not know how many schedules I returned. There are a good many more people than the number of schedules, because I did not return schedules for those having nothing above the $200 exemption. I wrote something over fifty schedules. I think I assessed some people having personal property whose land was not proved up.

My ranch covers 10,000 acres, including the land which I rent. I own in one ranch something over 5,000 acres, and another ranch some two or three thousand. I own sections 9, 11, 13, 15, 23, 21, 27; three quarters in 25, a quarter in 22, in township 3 north, 63. I know this description because, [*because*] I have offered it for sale many times and made plats. I am not trying to sell the other ranch, which includes two or three thousand acres, and so cannot give the legal description; it is located in 2-63 and 64. I am one of the few large land owners in this region.

I assessed my own property in 1912. None of my land is irrigated; it is all range land. I anticipated that an attempt could be made to irrigate this land or parts of it when the Denver Reservoir and Irrigation Company was proposing to come over there. I never expected to own it when it was irrigated, but was on a deal to sell it. I do not think it would be practicable to irrigate those sandhills, no matter how much water there was, but I was willing to sell it to somebody who was willing to try it. I think if anybody bought it at a price higher than that named, he would lose what he put in.

I bid $22 an acre for the state land because it was in the heart of my ranch, and I did not want anyone else to locate there; I wanted a contiguous, solid body of land, and was willing to bid ten
380 times as much as the quarter was worth rather than have a stranger come in. I dropped this purchase because I was satisfied that nobody else would buy it when the Irrigation Company went into the hands of a receiver, and I would rather rent it for 25c. an acre than make the subsequent payments.

I suppose that "market value" is what anything is worth for any purpose it can be used for. What it will bring in the market I should say is speculative value. I think the value would be according — the earning capacity. In 1912 I based my valuations exclusively upon the earning capacity of the land, capitalizing that and [*and*] stating the value of the land. In 1912 it could not have been sold for anything above that in the market. I offered to sell some of my land at $5 an acre, but it is worth only $3. I would not care to sell unless I could make a profit.

I assessed my land at $1 an acre, one-third of what it is worth, and I think Fischer raised it, with all other grazing land, to $2 in 1912, or it may be that the assessment was $2 in 1910 and that I returned all these lands which I assessed at $1 an acre. My price when I offer to sell my property is $5 an acre.

The stockmen are the only ones making a living in that part of

the country. They all have bank accounts, and I assessed the bank accounts returned. I asked about that. I returned something over fifty schedules, and there were not many bank accounts returned. I think I made a return for my own account, claiming no allowance on account of indebtedness. I owe no money, but did not have a very large bank account. I asked the other people the question on the schedule. "What are your average cash deposits in banking institutions?", putting down what they said and letting it go at that. I told the taxpayers where to sign, and that that was the oath. I did not read the oath to them, and I do not know how many of them read it, but I think very few. I think most of them knew they were taking an oath. They are a pretty intelligent class of people, and have been making out schedules for years. Some of them dodge taxes. Everybody does not give in everything he has.

I am acquainted with S. E. ¼ 25-2-63 only in a general way. I do not know that it sold on March 18, 1910, for $6,400, or at $40 an acre. I believe I assessed that at $1 an acre.

All land was not assessed at $1. We put in hay land at $2 an acre, which included a good portion of these places having cattle.

381 I have no distinctive recollection as to S. E. ¼ sec. 25, and would not say that I assessed it at more than $1 an acre.

I am familiar with S. E. ¼ 22-2-63. I did not know that one Turpin sold it to one Stewart January 5, 1910, for $1,200, or at $7.50 an acre. I think I assessed this piece at $1 an acre, this being on a one-third valuation. I would consider the value to be $3 an acre.

I am familiar with sec. 5 tp. 2, rg. 63. I knew that on February 3, 1909, S. M. Wiswold sold this to R. B. Scruggs. The purchaser defaulted after making one payment and Wiswold gets the land back. The consideration was $5,760, at the rate of $9 an acre. I assessed the property at $1 an acre. A Mr. Richardson made the purchase, making one payment, title passing through Scruggs as agent. I do not know how the purchase price was represented, except that part cash was paid, which the original seller told me.

Redirect examination:

This Wiswold land in 5-2-63 is partly sandy and partly bottom land. The B. & M. Railroad runs right through it. There is a well defined line between the sand hills and the low land, the low land being more in the Henrylyn irrigation district south of the Burlington track, and the sandhills north of the track. It is all range [counrty], with a similar value to the pieces described to me in sections 25-2-63, 22-2-63, and 5-2-63, the value of which was about $3 an acre.

ERNEST S. SCHOONOVER, a witness on behalf of [repsondents], testified on

Direct examination:

My name is Ernest S. Schoonover. I live at Eaton, Colorado, which is about eight miles north of Greeley. I have lived at Eaton twenty-three years, and the land about Eaton is under a ditch known

as the Eaton Ditch, or the Larimer-Weld (written Laramie-Weld in the transcript), of The Larimer & Weld Irrigation Company. I was engaged in the produce business, selling potatoes, principally, until three years ago. Since that time I have been working for the farmers around there.

In 1912 I did the assessing in the vicinity of Eaton, I think in township 6, range- 65 and 66. I am acquainted with the lands, ditches, water rights and the market value of the lands in that vicinity, and have observed what those lands will produce in farming and what the profits of the business are. From my experience I am able to state what the market value of lands and property located there subject to assessment is.

382 Before making the assessment in 1912, Mr. Fischer instructed me to assess land at one-third value, and assess personal property at full value, take out the $200 exemption, and divide by three. I followed these instructions.

I am acquainted with most of the people in the township I have mentioned, and generally know the lands and their character, conditions and worth. I was familiar with most of the lands. I made it a point to see almost all of the land I assessed.

I assessed irrigable land separately and at a different rate from non-irrigable. I assessed the improvements also separately. I made no deductions on account of rights of way for roads or ditches, or for farm yards and stock pens. There were deductions made for land not capable of service from the ditch with water, which was assessed from two to three dollars an acre, for the actual value. Some of that land is seep or alkali land, caused by water seeping from the ditches. This condition increases most of the time.

One of the principal crops prior to 1911 in that community was potatoes, in the selling of which I have been engaged. I think in 1904 and 1905 there were 1,700 cars in one season shipped from the Eaton station. The blight struck the crop in 1911 and was worse in 1912. In 1911 the potatoes raised were of very inferior quality. The skin was scabby; in some instances dry rot had set in, caused from the blight, and the potatoes were unmerchantable. Potatoes grown when the blight is on them are ill-shaped and long. In 1912 that condition depressed business in Eaton and vicinity and the farmers lost considerable money because of that disease.

When making assessments I read off the questions on the schedule to the taxpayers, asking them the number of cattle and number of hogs they had, clocks and watches, and number of farm implements. In a great many cases I saw the property, finding the farmers near the premises, where I had opportunity to notice the stock and implements. I think I got the property assessable in 1912 on the schedules which I returned. I did not undervalue any of it knowingly or at all.

I determined to arrive at the market value of real and personal property. I was familiar with most of the land, the amount it had produced, the distance from town and the railroad facilities. The soil differs in the different lands. I took into consideration

383 all the circumstances pertinent to each piece of land. I was not guided entirely by the selling prices of land, but took that

into consideration with these other facts, and with all those arrived at a conclusion as to the market value.

I had knowledge as to some of the personal property assessed. There are a few non-residents in my district, but as a rule they own land only. In the cases of non-residents I reported to the assessor the names of the parties, their addresses, and the quantity and different kinds of land they had. In my vicinity I had to assess some land which was purely grazing land above the ditch, but that land was close to irrigated land. I assessed those lands at from $2 to $3 an acre. I assessed the land capable of irrigation, with the water, at an average of probably $25 an acre. The improvements were assessed in addition to the land and water. When I assessed the land I assessed the water rights that were used with it. As a rule, I would ask the parties how much water they owned with their land, and in some instances, where they had plenty of water, I would assess the land a little higher.

I think I returned on my schedules all of the property, together with the property of non-residents, I reported which was taxable within my townships in 1912.

I am familiar with S. ½ N. W. ¼ 12-7-66, conveyed by Allison to Allison in 1910, for a recited consideration of $10,000, stated in the affidavit of Mr. Holcomb to have been a verified sale. The father sold the land to his son. The general talk was that no money changed hands; I did not investigate it.

I am familiar with N. ½ N. W. ¼ 12-7-66, conveyed by Allison to Allison, for a recited consideration of $10,000, stated in Mr. Holcomb's affidavit to have been a verified sale. I do not think any money changed hands in this transfer; it was a deal between members of the family, the father selling the land to the two sons. In each of these instances the father was conveying to his sons a part of the land he owned.

I am generally acquainted with the value of irrigated land in Weld County. I think the land, with the water supply, is worth fifty dollars an acre, on an average, excluding the seep land, grazing land and bottoms.

Cross-examination:

I live at Eaton, which has been a good sized and quite prosperous town. It was named after Governor Eaton, who, I think, made his home in Greeley. He owned a great deal of land in that
384 vicinity and founded the town. He had two sons Bruce and A. J.—who own a good deal of property in the vicinity of Eaton. Aaron J. lives in California and Bruce G. in late years has lived in Greeley.

I have lived in Eaton twenty-three years. The first three years I was in the state I was farming a few miles east of Eaton. For a great many years after that, and until very recently, I was in the produce business at Eaton.

I became familiar with irrigable land and its value and the value of water rights in Weld County by meeting farmers in buying pro-

duce, and loading potatoes in other places besides Eaton, including Ault, Pierce and Lucern, having occasion to go over this land quite often. I have never been engaged in the business of dealing in lands. I have owned land, which was in the vicinity of Eaton. In acquiring knowledge about lands I was not altogether governed by what I learned in the produce business and loading potatoes. I have heard of sales being made quite frequently throughout the territory.

I heard of some sales made in 1912 or shortly prior. I did not keep track of them, but would hear of them from day to day. I never examined county records, or anything of that sort to find out what transfers had been made but occasionally and casually they would come to my ears. I made no special inquiry.

When I said I paid little if any attention to selling value in making my assessment, I meant by "selling value" the prices people had paid for land. I used instead my best judgment as to what I thought the land was worth. I did not entirely leave out of consideration the "selling value," being governed some by the quarter which I owned, which I sold a year ago last May. I was not guided entirely by what I got for my land, but by my judgment of what the land which I assessed was worth.

Eaton was included in the territory which I assessed in 1912. The townships which I assessed were 7-65 and 7-66.

In saying that I probably got all the property assessable in my district I meant real and personal property. I do not remember whether I returned any bank accounts as being assessable; I do not think I did. The majority of the farmers said they owed considerably more than the amount of their bank accounts. It is customary with the farmers to borrow a few hundred dollars in the spring to pay their accounts with and for running expenses until the crops mature. The other people gave me no bank accounts. I had no way of investigating and took the word of the tax-
385 payers. None of them gave me a written statement of the indebtedness they desired set off against their bank accounts, and therefore swore to no written statement. In signing the schedule I supposed they knew what they were doing. The language of the schedule calls for average bank accounts. I asked them, if I asked them any thing, "What are your average bank deposits," and if they told me they did not have any I let it go. They usually told me they owned more than they had in bank, and I put down "None" after "Average Bank Deposits." I knew most of them owed it, but I did not know what everybody owed and to whom they owed it. I got no written or personal statement from any of them about the details of the claimed indebtedness. I knew in most cases the money they owed was to the banks in Eaton, and I think they owed some to the storekeepers. I do not think a man who has money owing to him from another ought to be taxed on it. The business men of Eaton were borrowing money in order to carry the farmer. The business man was carrying the farmer and the farmer the business man, I think. And none of these credits were assessed at all; I returned nothing in the way of moneys, notes and credits, or promissory notes, other evidence of indebtedness or

book accounts. I made an effort to find out from the bankers or the merchants or the loaners of money what their indebtedness was which ought to be set off against any items of credit they might have, but in all cases I failed. I got no written statements from any of these people either as to their indebtedness or the items of it. The only information I got was what appears upon the printed schedule.

Greeley is the largest town in the county, and Eaton is the next. I think 1200 people live in Eaton; there are two banks, one general merchandise store, and two or three grocery stores, and a big sugar factory there. I did not assess the sugar factory; I understood the president of the company would send that in to Mr. Fischer. I made an effort to assess it, and they said it had been the custom to mail the schedule to Mr. Fischer through their Denver office, the office of the Great Western Sugar Company. In the general store they handle dry goods and groceries and hardware; in addition there are drug stores.

I stated that the two transfers from A. Allison, to O. L. and E. C. Allison, respectively, were from a father to his sons. I have no knowledge of either transaction; I only heard talk about
386 them that no money changed hands. I never talked with any of the Allisons about it. The land conveyed is north of and adjoining and I think in the same section with Ault, which is a considerable town. I think the actual value of the land, including improvements and water, is about $90 an acre. I do not think it has any value as town property, although practically in the town of Ault. The sale price was $125 an acre. I assessed the property around Ault, including, I think this Allison property.

I heard of the sale of S. W. ¼ sec. 15, 7-65, from W. F. Graham to M. Sand on February 1, 1910, for $18,000, at the rate of $125 an acre. Mr. Sand sold the tract again this spring. I paid no attention to the Graham sale when I came to make my assessment in 1912. I assessed the land, including water rights and improvements, at $21.38 per acre.

I am familiar with E. ½ S. E. ¼ sec. 33, 7-65, sold by H. Anderson to O. C. Flemming on June 21, 1909, shown by plaintiff's record to have been sold for $16,000, or at the rate of $200 an acre. I do not think there was a great deal of money paid; probably there will be in the future. I do not know whether the balance was evidenced by a note and mortgage or not. I assessed that land in 1912 at the rate of $30.62 per acre, including water rights and improvements, and in my judgment $100 an acre is plenty for it. I think my judgment on the valuation was better than that of the man who bought it. I did not know whether this instance was a sale or not. I know the party who bought it owes for it still. In some instances I do not consider that land has been sold until the purchaser has paid off the mortgage.

I do not know as to N. ½ N. W. ¼ sec. 3, 7-65, sold by E. C. Farr to J. Stodel in June, 1909 for a consideration of $7,500, or 93.75 per acre. I assessed it at or about $1,660, I think.

The fact is that I paid very little, if any, attention to the prices lands were selling for at or about the time I made the assessment.

All the people who signed schedules swore to them. Most of them signed them. They knew they were swearing to them, because I told them to, and in a great many instances they did, read the oath where they signed. I returned a few schedules which were not signed.

I do not know anything of the circumstances of the sale of Mike Sand. I knew he bought the land, but do not think I ever knew the price. He was about [*the*] lose the land, but made a trade with some of his eastern friends this winter. He told me he lost
387 money in the transaction. He told me of getting about $3,000 worth of mortgaged equities. I think he told me at the time he paid down $3,000 or $3,500.

In a majority of the sales mentioned on cross-examination I could not be governed by what the land sold for, because I knew it was not worth it. I did not mean to state that I excluded sale prices entirely from my considerations. The sales mentioned seem to have been the highest in the territory. These sales would not I thought, and did not, stand. My experience has been that the parties who have bought at high prices have lost their land, losing about three years' hard work.

ALEX. WALKER, witness on behalf of respondents.

Direct examination.

By Mr. Tew:

My name in Alex Walker; place of residence Platteville. I have been in Weld County twenty-one years in Platteville one year.

I am acquainted with the character of lands and priorities pertaining to ditches that are used for irrigation on the irrigated lands in the Platte Valley, say from Denver down to the mouth of the Poudre. Yes, I know them.

I at one time had a farm two miles south of La Salle, under the Bucker ditch.

I had something to do with making the assessment in Weld County in 1912. I made the assessment in the same district in 1911. Mr. Fischer was assessor during those years. The instructions I got was to go out and go over the properties and gather up everything that I could find of assessable property and assess it, at what I considered was the fair value of the property. In 1912 we were instructed to take the personal property at its full value, then deduct two hundred dollars of exemption and divide the remainder by three. Yes sir, in the taking of the personal property I listed every single article, such as watches and clocks and all those things, they were all considered. While they were not named in the schedule, all of them were considered.

In 1912 I considered and ascertained all of the personal property the persons had whom I assessed, so far as they told me. When it comes to the personal property I started at the top of the schedule

and asked the questions of every article on that schedule
388 down. Yes sir, I saw them all. I asked them if that was all the property they had. In a few cases I found property that was not described in the list under the schedules. I wrote that into the schedule.

No sir, there were no instructions given to me by Mr. Fischer to in any way omit any property. As to that he instructed me to be particular and see that we got all the property. There were no instructions given to me by Mr. Fischer to under value any class of any of the property. In regard to the values; he instructed me to use my best judgment in the valuation of it, what I considered the property worth. I believe in one case down at Kersey, some little disagreement as to valuation of some property or something there, I called Mr. Fischer by phone, and he just answered that he had sent me down there for the purpose of assessing that property, to find out its value, and it was up to me to do so, and put it up at what it ought to be.

The vicinity in which I did my assessing was that surrounding Evans and La Salle and Kersey. Most of them are farming communities principally under ditch. All the territory that I assessed in 1912 extended out beyond the ditches south and east of La Salle. This is in the range country. Some of it was under ditch. It is range country. The country I assessed south of Kersey is principally range country. This would be above the Latham Ditch, which runs through the town of Kersey. On the south side all the way it is taken up by homesteaders. It is prairie country. At that time they were constructing a ditch around that country. That is the proposition that was afterwards in the hands of a receiver, the Standley.

My assessments embraced the last north and south of the Latham Reservoir. South of it, down the lower end of the draw, above the lake, below the Milton Reservoir there is considerable seeped land. What you call the seeped ground there extended up a couple of miles. There is some seepage north of *of* the lake and below the lake. I assessed some lands under the Independent, under the Union Ditch, under the Lower Latham, and around Evans, not the town, and lands under the lower end of the Loveland and Greeley; lands also that are on the north side of the Platte across the railroad, what is called the Kersey Flats, also termed the Pleasant Valley. It is my opinion that land is under the Cache La Poudre Ditch. That land in the Pleasant Valley is supposed to be the highest grade of land in the county, that which is watered.
389 All of these different ditches have different priorities of water rights. I have had experience in the use of water for irrigation, by observation and otherwise, in the Platte Valley, under the ditches I have mentioned, I think since 1891, or 1890. I am generally familiar with the character of crops that are grown, and the needs of the crops and the time and amount of water for irrigation. I am not familiar with ability of the several ditches to afford that supply to the lands. I know they don't get water very often

when they want and need it. Some ditches have better rights than others.

I have some ideas as to what it cost generally to operate those lands. Could not give it in round numbers, just what it would cost to irrigate any one of those farms. I know about the expense. I know of some sales being made in the years I have lived there. I know about what the land is worth per acre. I don't think the average value of all the irrigated land through there would exceed forty-five to fifty dollars per acre. That is the average value of all the land that is irrigated under those ditches. That is on just irrigated acres. There are some few acres on the ranches [than] are not irrigated. I don't include the land that is seeped up, nor the land that is above the ditch, and I don't include the land that might lay down between the river and the ditch, but still it might not be irrigated. I include in that the water right for its service.

I assessed a very small portion of the lands at Pleasant Valley. In assessing the lands, I certainly took irrigated land, range or pasture land, seeped land and hay land, that is, on the bottoms where they cut hay. In some of the farms I found there were natural hay lands. Where I did find that I gave them a separate value. These lands that I have described that were not irrigable, though on a farm that was irrigated, I gave them a separate value. That was grazing. Some lands were seeped up. These matters were taken into consideration in fixing my assessment.

I think the lands along under the Latham and Union Ditch and the Kersey Flats down there I assessed at twenty-two or three dollars an acre, in that neighborhood. I don't mean to say every irrigated farm was assessed at identically the same rate. I am speaking now of the Flats, very little variation in the Flats; the lands there are very similar. That assessment on the land was exclusive of improvements. In my opinion that assessment was as much in each case as one-third the value of the lands so assessed with the water thereon.

390 I think there was very little land that I assessed under the Cache la Poudre No. 2 ditch. I think I assessed that, with the water included, at thirty-five or forty dollars [and] acre.

I was on each one of these different farms under the Union, Latham, Bucker, Independent and the Greeley No. 2 or Cache la Poudre No. 2. I didn't travel around every man's farm, but just as you see it. I was acquainted with a great many of them before. I think I got all of the land that was assessable in that division. When I came to a man's farm and he had a hundred and sixty or an eighty, I took it for granted that was the amount of land. I so assessed it. You could see whether that was the amount of land that was broken and tilled.

Invariably I called their attention to the fact that they were making this statement under oath, that they must describe all the property. I didn't find very much as to clocks and watches and gold and silver. A good many clocks and watches around but they were not listed as clocks and watches. If a man came in and had something that was not worth assessing at ten dollars and had a pig

or wagon or a horse or something that had that much value, when we—— But we didn't increase his exemptions in that way at all. That was done so as to make the end figure as to each amount end with a cipher. I was instructed by the assessor to do that. I asked as to moneys and credits and notes and book accounts, bonds debentures and so forth of these farmers, as to whether they had them I read the list over to them. When I asked them those questions, when they said they had none, I considered as taking their word under oath. I suppose most of them are honest; I found cases where they were not. In those cases I modified.

The lands over south of Kersey above the ditches and under this proposed Standley system, in 1911, I believe that was all assessed at three dollars an acre. In 1912 there was a part of that land around there where they were building this ditch, they were expecting water there in 1912 enough to save some crops, and I think I raised a part of that land around under that ditch a couple of dollars an acre on that prospect. In 1912 or 1911, that land over there was not fitted for or capable of any use other than grazing live stock to return a profit. It was of no value as irrigated land, only the prospects of water. I think in the main that land that lies in these sandhills south of Kersey is not fitted for irrigation at a profit. I think the range and pasture land that I assessed there in 1912 was assessed plenty high.

391 Cross-examination.

By Mr. Dorsey:

My occupation during the years I have lived in Platteville was farmer and stock business. This last year I have lived in Platteville I have not been engaged in any business. Prior to the time I moved to Platteville I was farmer and stock dealer and raiser.

I have owned land in Weld County within the last six or seven years. The farm I once owned was two miles south and one mile west of La Salle. I think, as near as I can remember, it was the northeast quarter of section 24, township 4 north of range 66 west.

I made my assessments in 1912, I think, in townships 4-64, 4-65, 5-64 and 5-65. The land I formerly owned was not in the area that I assessed in 1912. I disposed of this land that I formely owned nine years ago, I believe, about that. It was an irrigated farm, all under water, improved farm, under the Bucker Ditch. I traded this ranch for something like a couple hundred head of cattle in Kiowa County. I don't know whether any value was fixed on it at the time we traded or not, but I was offering to take forty dollars an acre for the farm at a cash sale. That included improvements and water rights I had.

Prior to owning that farm there I had a farm about four miles west of there. I think I owned it about a year. I disposed of it before I got this other. I have not bought or sold or dealt in lands in Weld County in the last seven or eight years. Prior to that my experience had to do with the two farms I have mentioned, as far as I was in that. I suppose market value is based on what these farms

would produce in the way of crops and so on. That had a good deal to do with forming a value when I made my assessment in 1912.

During 1912 and the years immediately preceding that I had no knowledge or did not make any investigation to ascertain what lands were selling for in the territory I undertook to assess, only by what I heard of values. I would not consider what the deeds stated had been paid for the lands a value on the land. I would not base my value on the records of the deeds in the county court. My experience in that matter, when I sold both my ranches the party had to go on record at a price a good deal beyond what it was handled in the matter. If anybody had come and asked me about it I would have told them what the price was.

392 Q. What I am getting at is the actual price paid. You could ascertain by going to people concerned in the transaction whether the deeds stated the actual price, could you not?

A. I was not looking up that kind of people in making assessments to find out what they got for their ranches or sold them at.

I would try to find out what people were given for their ranches or what they were selling for in the range that I assessed only as I would hear of high sales, some low sales, and so on, I didn't consider that either the lowest or the highest values would have any bearing on the value of them, because they both might vary. The prices paid for lands would have bearing on placing a value for assessment purposes on the lands where they were bona fide sales. I went out and if I thought a piece of land was worth so much money, taking into consideration the soil and the facilities, and distance to market, and crops off of them. I would make up my own mind in [regards] to that, whether they sold it for a high or low price. I would not have made the selling price of lands a basis for my valuation. I would go on any information I got. I suppose it would be well to ask information and consider it along among the farmers as I assessed them and get their opinions of the considerations. What I mean is that I asked opinions of people who had been on these pieces of property. My idea about that value is not altogether the productiveness of the particular piece of land that I was assessing and what the products were worth and so forth. Water would have a great deal to do with that, under what ditch. There is quite a difference in the water supply for this land.

My experience as a deputy assesser altogether was not confined to the years 1911 and 1912. I assessed all the land in Weld County from the Adams County line to the Morgan County line south of the Platte River about fourteen years ago, all of it except two townships, for purposes of taxation.

These deputy assessors are reappointed each year. I was notified by letter the last time I was appointed. I took an oath at the assessor's office. That was before I made the assessment. I went to Greeley to receive my commission.

The assessor sent me plats and schedules before I began this assessment. He sent me plats of all the lands in the district that I was to assess. In a few of these plats he marked the valuations of the lands, and he also left off the names of the owners on the plat

that I got, the different pieces of land on certain plats, and I went back and asked him why he had done that for from the
393 year before, as it made a whole lot more work for us to do. Well, he said, "I wanted you to find those things out when you went out to assess and not make a copy of the assessment,—to ferret out the owners and put the values on those lands yourself."

The plats were not filled out with the prices on all the lands. I was guided by those figures if I found them to correspond with the land, but with the adjoining lands and lands that I was assessing, I left them out of the old assessment.

In making the assessments of these irrigated farms I excluded from the irrigated lands a good many acres as not being irrigated lands. I cut out wherever a man had five, ten or fifteen acres in his farm that was not good agricultural land or he could not get water on it, or it was seeped, we cut that out of the total of his land. I ascertained that acreage by looking over the land. I inquired of the owner of the land, and in some cases I accepted what he said. If I thought it was about right I didn't question it. Of course, I would only have my opinion in regard to the acreage of a piece of land by looking over it, and I found some of them had over an acre of seeped land and waste land right through the whole farm; had that surveyed on a plat and a blue print made of it to show half an inch. Some of the farmers had done that for themselves. Others made statements about it; there wasn't any other way to do it only to look it over. I think I spent some time looking over those farms to ascertain whether those statements were correct. I was on every farm that I assessed, I think, in the four townships, except four or five homesteads out on the sandhills. By going upon a [far-], I had an idea of forming an opinion as to what the acreage was. I didn't go out and walk clear around the fence and look it over, but most of those farms you can look them over without doing that.

La Salle, Evans, and Kersey, three towns, were included in this territory that I assessed. In ascertaining what personal property any of these people had I just read them one after another the items in the schedule, and they stated whether they did or did not have property of that description. I accepted their statements. A good many cases, so far as personal knowledge, I would go out and look over the machinery in the yard, wagons and farm implements around there to give me some idea whether they were telling the truth. If I thought they were not I would catechize a little more. That occurred in a great many instances. The same condition as to live stock. In a great many instances I would go out and
394 count a man's stock. When I would go out to a corral and found he had more cows or more head of cattle [then] he told me, if he didn't give me a satisfactory explanation whose they were or where they came from I added them on the assessment roll. I found cases where there was three or four cows reported, and I found out afterwards from inquiry that they had fifteen or twenty, I would correct the assessment and notify him that I had raised the assessment after he had signed the schedule.

Where I inquired whether they had any money in the bank, they

said they had no money in the bank over and above what they owed, and that they were entitled to so much money in the bank for the running of their farms, something of that sort. I suppose nearly all of these people put what money they have in a bank. In the towns in which I made assessments, I took the same mode to ascertain the bank accounts. I don't know whether I made any return of cash in banks. I made a report of some mortgages they acknowledged they did have.

About half of the territory I assessed, I suppose, is a very prosperous territory. If a considerable number of people in that territory have money loaned out they lied to me. There are a number of stores and mercantile establishments in that territory. I suppose they had book accounts against various people. They always claimed they owed more than their book accounts showed. In my estimate of 1912 I don't think I made any return of book accounts, promissory notes and other evidences of indebtedness, anything but some mortgages, and I am positive of making report on book accounts in one instance. I couldn't tell you what that amounted to.

The reason I didn't make any return for assessment of any bank accounts or book accounts or any of these matters of credit, when I asked a man that question and he was under oath, and he said he hadn't anything of that kind, I didn't consider that I had any authority to go any further into the matter; my authority ended there.

Nearly all of them said to me that they owed as much money as they had. I didn't have them put that in writing about the indebtedness for which they claimed an offset or give any details as to what it consisted of. [The-] signed the schedule and swore to the questions I asked. It was my impression that I had no authority to swear anybody at all about things of that sort.

395 That land that I assessed under the Standley Lake Irrigation system in 1911 at $3.00, I considered the three dollars per acre was the full value of the land. If land that year was taxed at one-third of its value, that ought to have been taxed at one dollar per acre; so that the assessable value of that land on the one-third basis would be one or two dollars per acre; that is what I believe it was assessed at. In 1912 I raised it to five only in a few cases where they expected to get some water that year. I think that would be the full value of that land. The raise I made was upon the theory that the construction of irrigation works from which it is expected the land will be irrigated gives additional value to the land; it hadn't got into action yet. The lands under the Standley Irrigation system on which I raised the valuation are below the lake. There were three or four farmers along there who got a little excited over the water business, and they didn't seem to object if I put a dollar something an acre on it if they were going to have water there.

I am familiar with the farm of Mr. McAfee, Sheriff of Weld County, which is just a little east of Kersey. He owns there section 23, township 5, range 64. There is about one hundred acres of it likely under irrigation. He pumps the water out of the river for

that. He has some small improvements on the farm. There is about three hundred acres of the remaining portion that lies in the south part of the section, out in the open sage brush, sandy land, not fenced at all. That is up the hill and drops over the other way. To irrigate that he would have to pump water way up over the railroad; I don't think it would be feasible. Then the balance of his land is over—The Platte River runs down through on the other side. I think that land of his there that is irrigated is assessed—my idea of it would be along about ten dollars. I think I would assess part of that over in the river and that on the west side along in there with the river at a [dollars] an acre, and I think the other land there I put it in at two dollars an acre. That is the assessment I made on it.

Q. As a matter of fact, don't you know that in respect to Mr. McAfee's land in section 23, township 5, range [6*e*], you assessed just fifty acres at the rate of fifteen dollars an acre; that you assessed 580 acres at the rate of three dollars an acre, and put a value on his improvements of two hundred dollars? Do you remember that?

A. I expect that is about what I [*done*], about my idea of it. I don't remember the acreage there.

396 Redirect examination.

By Mr. Tew:

If that land there was assessed fifty acres at fifteen dollars and the remainder at three dollars, I think it would be the full one-third value of the land.

JOHN CAMPBELL, witness on behalf of respondents.

Direct examination.

By Mr. Tew:

My name is John Campbell. I reside at Ault, Colorado; have lived there since March, 1906. I had been engaged in the mercantile business for four years, run a general store at Ault. I have been in the real estate business some lately.

I had something to do with making the assessments in part of Weld County in the vicinity of Ault in 1912. I am acquainted with the value of lands under ditches in the vicinity of Ault. I am acquainted with the character of the soil and what it is fitted for. I had to do with making the assessment of 1912 in township 8, range- 65 and 66. That includes the town of Pierce. In addition to that I had the town of Ault. The lands in township 8, in ranges 65 and 66 are partly under the Pierce Lateral, partly under the Larimer County Ditch and partly in the Greeley-Poudre Irrigation District.

The work on the Greeley-Poudre District had been abandoned in 1912. The work was not completed in any part so that water could be delivered on these lands.

The land that I assessed was under the Water Supply and Storage in the Pierce lateral. The Pierce Lateral is a branch of it, covering

a new territory. Some of the land under the Pierce lateral is still unbroken. I think they have run water in the Pierce lateral about five or six years.

Before I made the assessment my instructions from Mr. Fischer were to get all of the property at a fair valuation; the personal property was, he instructed me, to be at full valuation, then to deduct the exemption, then divide by three, I was urged by Mr. Fischer to get all taxable property. In following these instructions I visited each man's place, went right on the ground and listed his stuff. I took the schedule and went right down the list and put it down as he gave it to me. I also went around the place in some cases and verified the statements that he gave me. I think I did not find any property that was not turned in. I think I got all the property in that division of the county that was subject to my jurisdiction for taxation, possibly there might be a little.

397 I claim I assessed the lands at as high as one-third their actual value. That pertains to all classes, irrigated and non-irrigated lands. My assessment included all the circumstances that surrounded each particular place.

As to assessing the gold and silver of the people there and the clocks and watches, I asked them those questions and put it down as I found it. I endeavored to make the values as far as possible on the different items so that no item would be valued at less then ten dollars. If I would run onto an alarm clock I would bunch the several items together to make up the amount of ten dollars. That was done under instructions from Mr. Fischer.

In arriving at a conclusion as to the value of land there are several things to be considered; selling price and the return which it brings.

The several tracts that I assessed I assessed fully, irrespective of whether there was a highway off of it or not; did not exclude ditch rights or rights of way, barnyards or corrals from the area of each farm assessed.

I taxed the water rights with the lands, and fixed the irrigable value as the value with the water right for it.

The value of the northwest quarter of section 3-6-65, stated to be conveyed by A. C. Fleming to T. H. Wilson for $20,700, in 1912 was perhaps sixteen thousand dollars.

I don't know anything about the southeast quarter of 33-7-65, conveyed by H. Anderson to O. C. Flemming, June 1909 recited consideration sitxeen thousand dollars.

I know the land. I would say the value of that land is ten thousand dollars.

The southwest of 15-7-65, conveyed by W. F. Graham to Mike Sand February 10, 1910, having a recited consideration of eighteen thousand dollars. I should think in 1912 would be worth somewhere around fourteen or fifteen thousand. Sand paid eight thousand down. I understand that for his equity he got an equity of three thousand dollars in property in Iowa. He was on the place three or four years. Was a hard worker.

I would say the average value of the irrigated lands I assessed in

1912, that are under ditches, with the water, was from forty-five to sixty dollars per acre. I assessed the land under the ditches used in connection with an irrigated farm which was not irrigated at about three to five dollars per acre, I think; I am not sure about that.

398 Ault has decreased in population considerably since 1910. Real estate in Ault and its vicinity might bring now or in 1912 sixty per cent of what it did in 1909 or 1910. Prices in that vicinity since 1909 to the present time have declined materially. The principal cause of this is the potato blight. The population of Ault is perhaps twenty-five per cent smaller than it was in 1910. I understand it has decreased some at Eaton. The decrease has been more marked at Pierce than at either Ault or Eaton. A majority of the stores at Pierce are standing vacant. Quite a number of vacant buildings at Ault.

I have to some extent been generally acquainted with the farmers and what they have been doing in that community in the last few years. I would say the majority of them are going behind in their farming ventures.

There was blight on the potato in the year 1911. That renders the potato almost useless as to marketability; it cuts the yield off almost entirely. There was not so large a crop in 1912 as in 1911; not so much planted; outside of that the blight was the same thing. The effect of that as to the quantity planted in 1913 was a very small acreage this year. That blight had a very bad effect upon that community.

This land for renting purposes in the vicinity of Pierce under the ditches, with full water rights, considering the expense of the land owner, in my judgment will return interest at six per cent upon a valuation per acre of forty or forty-five dollars.

Cross-examination.

By Mr. Dorsey:

I had a store at Ault almost four years. I have given up that business now. Since I left the mercantile business I have been on a ranch some, and during about seven or eight months of that time I was in the Pierce State Bank, as Cashier. I left the mercantile business I think in November, 1910. I have been in the real estate business some lately, since I went out of the bank.

In the two townships which I assessed in 1912 there was some land embraced just within the Greeley-Poudre Irrigation District, I think, I couldn't tell you just how much. I think the valuations I placed for assessment purposes upon those lands ran from two to five dollars. It was my effort as to these lands to make my assessment one-third full value. To determine the value I take it for what they are worth for grazing purposes, simply treated them as grazing lands. I think grazing land without any water to irrigate it was worth from two to five dollars an acre. The reason I

399 gave no value to these lands whatsoever on [*on*] account of the prospect they had of obtaining water for irrigation, I didn't consider they had much of a prospect. I didn't take into

consideration at all any value on account of the probability or possibility that these lands might have water when I made the assessment. I understood that fact was taken into consideration by people who bought and sold lands in that district, and lands in very large quantities were bought and sold at prices which took that fact into consideration. Those lands were bought when that project was on the boom, before it fell. It was on the boom more or less from the time it started; it fell I think in 1910 or 1911. Personally I don't know of any sales under the Larimer-Poudre in 1911 and 1912; I would not say that it did not occur. I took no particular pains to ascertain whether any such sales occurred when making my assessment. I don't know that the lands in the Greeley-Poudre district were worth any more in 1910 than they were in 1912. That is all grazing anyway. I have heard of quite a number of sales being made up there in 1910. I think at prices very much more per acre than three times five dollars, but that was made on the strength of the Larimer-Poudre project. When I assessed the lands I left the [illegible] entirely out of consideration.

There are two towns, Pierce and Ault, in the territory that I assessed. Ault has seven or eight hundred people, and Pierce perhaps two hundred. No manufacturing establishments at either of these towns in 1912, several mercantile establishments at Ault and two or three at Pierce; general stores, butcher shops, hardware; two banks at Ault, one at Pierce.

There was quite a bit of money loaned and credit extended to people in the region I assessed in 1912, extended by the banks and stores to the farmers. I don't know of any individuals there who loaned money to the farmers. The stores were carrying the farmers and allowing them to get goods on credit with the idea that they would get their pay when the crop was had to a considerable extent.

The bank at Pierce when I went in there had deposits of about forty-six or seven thousand; the deposits of the two banks at Ault would probably be about one hundred and twenty-five thousand; that would make for the three banks an average of approximately 175,000. In the Pierce bank I would say eighteen hundred dollars of the deposits were county funds; that is all the public funds we had. That would be a small percentage of the total deposits. It would run approximately the same percentage of deposits in the two Ault banks. In the case of the Pierce bank it would run about five per cent.

400 I don't remember how much I returned for assessment purposes in 1912 on account of bank deposits and moneys, notes and credits and book accounts and other evidences of indebtedness. As I recall now I did not return anything at all. It is my recollection that I returned some, but I don't recall how much. I think it was as much as a thousand dollars. It was all I could find. I knew about the deposits in bank, and of the credits extended by merchants in the way of book accounts. I would ask a man if he had bank deposits and all those questions on the schedule, and if he said "No" I would write it down that way. In some cases I pursued the inquiry further, asked him some other questions. In the main I would find that he didn't have any money. Some of them claimed that they ought not

to be assessed on items of property like that because they owed money. The main reason I found that I did not get it was the people didn't have it. I don't know where those deposits came from that are in the bank, but they certainly weren't in my territory, because I believe I would have got them. Some of them who lived in Ault and Pierce probably had bank accounts in the banks in those towns.

I did not take any written statement of indebtedness from anybody by which he might claim to be entitled to reduction of assessment because of moneys, notes and credits. I had no such written statements sworn to by anybody.

The northwest quarter of 3-6-65 conveyed by O. C. Flemming to T. H. Wilson is not in the Greeley-Poudre District. That is under the Eaton Ditch, if I am not mistaken on the piece of land. The improvements consist of quite a large house, worth probably two or three thousand dollars. The other improvements are small. All of the improvements would be worth probably thirty-five hundred. That would leave, according to my estimate, for the land and water rights, $11,500; something like that would be about right. I think it is not pretty low.

The southeast — of section 33-7-65, transferred by H. Anderson to O. C. Flemming, is not in the Greeley-Poudre district. It has water rights other than the Greeley-Poudre water. I took into consideration the water rights as well as the improvements in giving the value of ten thousand dollars. The value of the improvements would be perhaps ten to twelve hundred dollars. The balance, eighty-eight hundred or nine thousand dollars, I would assign to the land and water rights. I did not assess that property.

401 On the other transfer about which Mr. Tew inquired, a sale by W. F. Graham to M. Sand, southwest quarter of section 15, in township 7, range 65, my value there included the land, water rights, and improvements, included everything. The improvements consist of house and barn and other buildings just fair, worth five or six hundred dollars—seven. My valuation on the place was fourteen to fifteen thousand dollars. I would say it ought to be worth $15,000. I didn't assess that either.

The majority of the farmers in my part of Weld County do not make as much money — of their property and farming operations as it costs them to carry on the operations. I think that is generally true of the farmers up there. What I have in mind is the potato blight, that is why they lose money. They are gradually quitting the potato business. This present year they have planted even a less acreage than they did the first year after the blight. This land that they did not plant to potatoes they planted to some other crop. They did not leave all of it untilled; still there is some not cropped.

We have never found any great big profit to the farmers in sugar beets. The fact of the matter is there is a living and some little profit, but not much. There was quite an acreage of potatoes in the region I assessed in 1912 last year, I couldn't state how many acres; not so large as in former years.

Redirect examination.

By Mr. Tew:

I was bank Cashier at Pierce from the 12th of August, 1912 to the 5th of May, 1913. That bank has been abandoned; there is still another there. The conclusion that the deposits in that bank of Pierce did not come from the people in the neighborhood I made because of my knowledge of their financial condition generally. I know a large item of these deposits, something like forty thousand dollars, all of that money that was loaned there, came from outside the county as to our bank. That amount was in addition to the public funds usually on deposit in that bank. What I meant to testify in response to Mr. Dorsey was that my knowledge of the people in the community during those depressing times led me to conclude that the deposits did not come from the people living there, that is what I stated. I also had in mind the banks and the people and their condition around Ault.

When I stated to Mr. Dorsey there was no big money in the beets,
I had in mind that the values which preceded the potato
402 blight had been in a large part made by the profits of potato
culture. Without the potato in that community, the farm profit is reduced even if the lands are usable for beet culture and other crops. We haven't found anything, so far as I know, that would produce a profit equal to potatoes.

As to the lands under the Pierce Lateral, some of the lands which were first broken out have remained dormant and unused some of the years since.

The First National Bank at both Eaton and Ault are operated by what is called the Clay and Robinson Commission Company, live stock commission men with headquarters in Denver. I don't know that they have furnished a large amount of money to carry the farmers in the vicinity of Eaton and Ault, I have understood that. The farmers in the potato belt in the vicinity of Eaton and Ault and Pierce were to a greater extent borrowers and debtors in 1911, 1912 and 1913 than in preceding years.

Recross-examination.

By Mr. Dorsey:

I am familiar with the northwest quarter of section 35, township 8, range 66. I assessed that in 1912. That is outside of the Greeley-Poudre Irrigation District. It has a water supply otherwise. No sir, I did not know that within the last three years that property sold for sixteen thousand dollars. I don't remember that I assessed it at $2,550, land improvements and water, but I would say approximately something like that.

I am familiar with the northeast quarter of section 32, township 8, range 66. I am not aware of the fact that within the last three years that quarter sold for five thousand dollars. I don't remember that I assessed the land, water rights and improvements in 1912 at $580. My impression is that is outside the Greeley-Poudre District. I believe it was.

I know the east half of the southeast quarter of section 24, township 8, range 66. I am aware that it sold for twenty-eight hundred and fifty dollars within the last three years. There wasn't any water rights with it. I don't remember what I assessed it at. If it is $375, I presume that your figures are right, it is a little low.

In a general way I know the north half of section 23, township 8, range 66. I am not aware of the fact that within the last three years that sold for $12,800. I don't remember that I assessed it at $1,600, land, improvements and whatever water rights there were. That is out there, grazing land; that is in the Larimer-Poudre.

403 I know where the southeast quarter of section 23, township 8, range 66 is. I am not aware of the fact that within the last three years that sold for $9,000. I don't remember what I assessed it at.

I am familiar with section 19, township 8, range 66, the entire section. I don't know whether that is in the Greeley-Poudre District or not. I didn't know of the sale of that piece of land within the last three years at $8,824.

I know in a general way where the northwest quarter of section 14, township 8, range 66 is. That is in the Greeley-Poudre District. I am not aware of the fact that that sold within the last three years at five thousand dollars. I assessed that piece of land, including improvements and water rights, if any, at something like $900 I presume.

I am familiar with the west half of the southeast quarter of section 28, township 8, range 65. I think that is under the Pierce Lateral. I believe I knew that that piece of land sold within the last three years for $8,800. I don't recall what it was assessed at.

I am familiar with the south half of the southeast quarter of section 21, township 8, range 65. I think that is under the Pierce Lateral extension. I did not know of the sale of that piece of land within the last three years for $3,500. I don't recall that I assessed it at $1,400.

I am familiar with sections 15 and 23, township 8, range 65. I don't believe they are in the Greeley-Poudre district. They have no water with them at all, they are dry. I am not aware of the fact that those two sections sold within the last three years for $45,000. I don't recall what I assessed them at.

I am familiar with the west half of the southwest quarter of section 10, township 8, range 65. I didn't know of the sale of that piece of land within the last three years at a price of $32.00. I don't remember that I assessed it at $400. There isn't any water right, it is dry land.

I am familiar with the southwest quarter of section 8, township 8, range 65. I think that is not in the Greeley-Poudre District. I am not aware of the fact that that piece of land sold within the last three years at $8,000. I assessed it at something like $2,245 I presume.

I am familiar with the southeast quarter of section 6, township 8, range 65. I believe I know that that sold within the last three years for $5,600. That is in the Greeley-Poudre district. I don't remember what I assessed it at. It is dry land, bonded, grazing land.

404 I am familiar with the southwest quarter of section 28, township 8, range 66. I believe I understood that $5,600 was what it was sold for within the last three years. That is in the Greeley-Poudre district. Only a part of it can be irrigated at all. I don't remember what I assessed it at. A part of it is under the Pierre Lateral, I don't know just how much.

I know about section 31, township 8, range 66 just in a general way. I assessed 8-66 in 1912. I am not aware of the fact that within the last three years that property sold for $14,200. I presume I assessed it at $1,920. A part of that section is in the Greeley-Poudre. I don't know whether there is any water goes with that out of the Pierce lateral.

I know where the southwest quarter of section 34, township 8, range 66 is. That is under the Pierce ditch. I am not aware of the fact that that property sold within the last three years for $6,100. I don't remember that I assessed that property in 1912 including improvements and water rights, at 850.

Lands were not selling at those prices when I came to fix my assessment. I have not known of a sale in 1912 up in that country. With the conditions there as they were, they bought only on the assumption that the Greeley-Poudre was going through. A majority of the lands you have mentioned were in the Greeley-Poudre. I considered those matters some when I came to assess. I knew about what they had been selling for in a general way.

At the time I *understood* this work I received from the assessor at Greeley plats of the lands I expected to assess. I think part of the plats had the values marked on a few pieces, perhaps. In some cases I assessed lands at a higher value than indicated by the figures on the plats, wherever I found it was not high enough. I did not that I recall in any instance assess it lower than that.

W. C. LEVIS, witness on behalf of respondents.

Direct examination.

By Mr. Tew:

My name is W. C. Levis. I am a farmer. I live about two miles from Greeley; have lived in Weld County thirty-three years. I farm under the Greeley and Loveland Ditch. That takes its supply from the big Thompson; sometimes rent water from the Boyd Lake, the Seven Lakes and Lake Loveland are in connection with that.

405 I occupy the position of County Commissioner in Weld County; took my office in January, 1911. The commissioners of that county in 1912 were myself, P. G. Bolander, and from either March or April George Hodgson.

I have been engaged in farming by irrigation in Weld County about twenty-five years. To a certain extent I have become familiar with the County during the time I have been commissioner, as well as before. I am acquainted in a general way with the lands that are under ditch and irrigation works that are completed and in operation throughout the county. Of course, some parts of the [c-unty] I am more familiar with than others. I think I am ac-

quainted with what the lands are generally fitted for and their return values for cropping purposes. In my estimation the average value of the lands under ditches and capable of irrigation, excluding seeped land, sloughs or waste land, would be somewhere from fifty-five to sixty dollars an acre. I base that conclusion upon these years of experience in operating the lands, or some of them, and seeing the result of efforts put forth on other parts. I do not from actual experience know what the grazing lands of the county that lie beyond this irrigated territory are worth for grazing purposes.

I was one of the acting county commissioners at the time of a settlement which was sought to be made of some former difficulties between the Union Pacific and Weld County, at the court house at Greeley, about the 30th of April, 1912, when these matters were discussed by the parties present, who were Bolander and Hodgson, county commissioners, Mr. Fischer, county assessor, Mr. Patterson, the treasurer, and Messrs. Scribner and Holcomb, Tax Agents of the Union Pacific, and Mr. Thayer. I remember the circumstances. I don't recall anything that was said at all that the county was underassessed. It seemed that prior to that time they had been taking this from the valuation and then divided it by three, which in looking it up at that time they thought was wrong, and Mr. Fischer said that during 1912 they would remedy that and make it right. There was not to my recollection anything said by me, Hodgson or Fischer to the effect that the county was underassessed on any part of its property. If it had been said, I probably would have heard it, and we were discussing everything in that line. Fischer never at any time stated to me that he had undervalued the property of the county. I have never had any understanding with Fischer as to what values he or his deputies was to return in making assessments. I have never in any way endeavored to influence or coerce or control the action of Fischer or any of his deputies in the as-
406 sessment of the county. The duties that came to me as a member of the equalization board is all that I have had to do with it.

I didn't know anything one way or the other about the method that had been employed in previous years as to the different exemptions.

I never had any understanding with any member of the board that any influence in any way was to be brought by the commissions upon the assessor of the county or any deputy that he was to undervalue or omit from assessment in 1912, or any year, any of the property of the county which should rightly be assessed.

Cross-examination.

By Mr. DORSEY:

I have a farm near Greeley; bought it in 1893, I think. Reside on it now, and have ever since I bought it. The description of my farm is all of the southwest quarter of 18, township 5, north of range 65, and I have the south fifty acres off of the south part of

the northwest quarter of 18. I have with the land the Greeley and Loveland Ditch water and the Lake Loveland water. That is an improved farm, most of it available for cultivation. In 1912 about 160 acres were actually irrigated and cultivated; some of that remaining portion might have been broken up and cultivated and irrigated in 1912. There must be some seven or eight acres used for corrals and building places. The improvements on the place are houses and barns, drainage buckets, two residences, one small one, two sets of barns and outbuildings. The value of the improvements on the place in 1912 was probably somewhere between three and four thousand dollars.

I hadn't put any price on my place in 1912; if I was to take what I got off of it in 1911 and 1912 it would not be worth very much; that is my idea of placing value on lands, what it will produce. I think market value of real estate would be what you could get for it at a fair sale. The market value of my place would be may be ninety to one hundred dollars an acre, would average that straight through the 210 acres, including improvements and water rights. That would make my property worth about $18,900, approximately; the improvements about ~~four~~ thousand. I presume I knew at the time when the assessor was around that my entire place, including all improvements, and water rights, was assessed in 1912 at $3620. I presume the market value was at least five times as much as that.

407 I base my estimate as to the value of irrigated or irrigable lands in Weld County in 1912 at an average per acre of fifty-five to sixty dollars on sales that I had known of from time to time and what people have valued their places in talking with them. I couldn't cite you any particular sales that I have known about personally. My time has been pretty well taken up with farming and my duties as county commissioner. I have not paid any particular [—] to the market value of lands; only just what I learned; I have not been buying or selling any land. What I thought the land was producing might have something to do with my estimate, but that was my estimate on the value of the land. I based my estimate on only just what I have heard from time to time from different sources, people who were trying to dispose of land and so on.

I was present at this meeting on April 30, 1912. I don't know whether Mr. Fischer recommended this settlement with the Union Pacific any more than the others. It was talked over among us with the county attorney and we all agreed on it. I think the question of revaluation in the county was talked over too at the same time. We had talked it over before that meeting. Mr. Fischer had talked it over with the commissioners before; he had recommended it on these previous occasions. I don't remember that the same subject was brought up in 1911. No sir, this reappraisement of the county has not been done yet.

Mr. Holcomb of the Union Pacific was present at the time of this settlement on April 30, 1912. I don't remember particularly as to Mr. Fischer having with him a list of what purported to be transfers

of lands showing considerations paid for lands. I remember Holcomb first talking about some high values they had found. I don't think Fischer suggested to the Board of Commissioners that Holcomb should go out with this committee of three and give them what information he had gathered; I am not sure but Mr. Holcomb suggested it himself perhaps. If Mr. Holcomb suggested it; nobody acquiesced in it that I know of.

I don't remember it at all if the board of county commissioners made specific inquiry of Mr. Fischer at that time about the valuations that he had placed for assessment purposes upon the various classes of lands in the county and the relation that those assessed valuations bore to the full value of the same properties. I would not say that did not occur, but I don't remember if it did. Mr. Fischer never stated to me nor in my hearing that the
408 valuation for assessment purposes upon lands in the county was less than one-third of the full cash value; I am sure of it.

While I was a member of the county board of Weld County they sat as a board of equalization the first and third Tuesdays of each September. I have sat with the board in that capacity in 1911 and 1912 and the present week. There has nobody come before the board with any complaints since I have been on. We haven't done any equalizing at all in that county since I have been on the board.

We have had a good many applications to the county board by taxpayers in the county for rebate. We have granted a number of them since I have been on the board. That would be true in respect to the assessment for 1912, collectible in 1913. We have granted a number of those. The effect of granting those rebates is in substance to reduce the total of the taxable value as shown by the assessment roll. I could not even make a guess as to what that has amounted to in respect to the assessment for 1912. They came along at different times, people claiming they had been assessed too high. We had similar complaints in 1911 and 1912. When complaints of that kind are made to the board the persons' schedule is submitted to the board. We inspected those schedules in 1911, relating to the schedule of 1910; and those that we inspected in 1912 would relate to the assessment of 1911. On the face of those schedules it appeared that in 1910 and 1911 the $200 exemption was deducted from the one-third valuation. I knew that the practice was in 1910 and 1911 not to assess at the full cash value. The $200 deduction is a part of the printed portion of the schedule; that is the form of schedule as used in Weld County. No, it was not possible for me not to have known prior to April 30, 1912 what the custom had been about the deduction of these $200 exemptions; it was never called to my attention. I never paid any attention to that part of it.

As I understood it, the assessor in Weld County in 1912 tried to assess the property on the one-third valuation. According to your figures, if the value is right, my property was assessed at about one-fifth valuation. I did not know that my property was being assessed so much lower than the average property in the county;

never had my attention called to that. The board of county commissioners in Weld County did not during any of the years that I have been a member of it ever raise any values which the assessor had fixed for assessment purposes.

409 Redirect examination.

By Mr. Tew:

Rebates very often concerned corrections; clerical errors sometimes. Sometimes land would be assessed in irrigation districts that did not belong there. The land assessed as farm land which in fact was all grazing. Those were the principal subjects that were concerned in the rebate matters.

GEORGE A. HODGSON, witness on behalf of respondents.

Direct examination.

By Mr. Tew:

My name is George A. Hodgson; I live at Platteville, Weld County, on the east side of the river; my farm is on the west side of the river under the Hodgson ditch.

I have lived in Weld County fifty years; have been over most of the county; am a member of the board of county commissioners; was appointed by the Governor on the 17th day of April, 1912. Since that time I have been over the principal portion of the county.

I am pretty well acquainted with the character and value of lands in Weld County which lie under the ditches. I think I know what those lands are worth and what they will return in the farming business to which they are adapted.

Assuming that under the ditches that have water supply in Weld County there was 250,000 acres of irrigated lands, excluding new projected works which have not yet come into full use, in my judgment the average market value per acre of the irrigated acres serviceable with water, including the water and water rights necessary for their irrigation, taking the county over, is fifty to fifty-five dollars an acre.

I was present at the conference concerning a settlement of the dispute over the taxes between the Union Pacific Railroad and Weld County. There were present three Union Pacific men, our county attorney, treasurer, assessor and three commissioners, Levis, Bolander and myself. Mr. Holcomb and Mr. Scribner were the gentlemen for the railroad. I don't recall the name of the lawyer for the road now. At that time I didn't hear Mr. Fischer say anything about the county being undervalued. I don't think he ever said anything to me to the effect that he in assessing Weld County had undervalued the county. He never said to me at any time, or in my presence, that he had caused purposely, or otherwise, any property in the county that was assessable to be omitted.

410 After the settlement there was something said about the exemptions. If I understand it right, the exemption that we

had of $200, there was quite a number of them would say, if a man had $600 worth of personal property, instead of taking $200 off first and then assessing that one-third of what was left, it was taken off afterwards, and therefore that would leave nothing there to assess; and that was talked over to be rectified in the next assessment. Mr. Fischer and quite a number talked about that; I think Mr. Scribner.

In the commissioners' office we talked over this plan of getting a committee of three experts. We thought it would be a good idea to get a man that was familiar with farms, a man that was familiar with buildings and a man that was familiar with stock, and have them go out and see whether there was an overassessment or an underassessment of what we got there, and to equalize the assessment throughout the county in the way of buildings and stock and farms. That was because of the inequality of the assessment. Mr. Fischer spoke of that several times. I think before that a time or two he spoke of it; he spoke of it afterwards. That was never done. I have no recollection of any talk the board had with Fischer after that in regard to the levying of assessments.

I did not in any way endeavor to or in any manner, directly or indirectly, influence the assessor or any of his deputies in doing the assessing work in 1912. I had nothing to do with it at all. I knew nothing about what the amount in total of the assessment was to be while it was being made. No conference of any character between the board or myself or any member of it and Fischer or any of his force that I know of.

Cross-examination.

By Mr. Dorsey:

I am a farmer by occupation. I have lived in Weld County ever since it was a county about. My present farm is just a mile west of Platteville; have owned that place since 1892, my father owned it before that time, or a part of it. I have four hundred acres there now; sold some recently. I had about twelve hundred acres out there at one time. I have not made any sales on my own land for three years.

I own at the present time the southeast quarter and the east half of the northwest quarter, and the west half of the northeast quarter, section 14, township 3, range 67 west. I did own at one time the east half of the northeast quarter of 14, and the southwest quarter of 13, and the west half of the northeast of 13, the same town and range. I owned the southeast quarter of section 10, and the
411 west half of the northwest quarter of 10, same town and range. And I owned section 15, township 3, range 66. The first description I gave, four hundred acres, I still own that. I own my own ditch, the Hodgson ditch. That is an old priority, built in 1869. I have plenty of water to irrigate my farm, 12.82 feet per second of time. To irrigate these other places that I formerly owned but now sold, the Farmers' Independent watered in section 13, Beaman irrigating ditch in section 10, 15 was dry section. The ditch I own is used exclusively to irrigate my own farm.

There are four hundred acres in my present holding. It is pretty well improved. I have two houses and a large barn, and the usual outhouses and fences. The improvements on April 1, 1912 were worth about twenty-five hundred dollars; I have built some since; there are about five thousand dollars' worth of improvements there now. About 150 acres, I guess, of this 400 acres was in cultivation in 1912, ploughed land. The rest of it is in alfalfa and wild hay and pasture. All but very little of it is under ditch. The Platte river runs through it a mile; except for the space taken up by the Platte River it is all under irrigation. There is not over fifteen or twenty acres that is not irrigable; some of it too wet; some I have to drain. Where the Platte River runs through there is a strip of about forty acres; that is included in the 400 acres that I described. I can apply the water to all the balance of the 400 acres. I guess my place was worth in 1912 about sixty-five dollars an acre, take the four hundred acres, what is on there and improvements and everything; it would have sold for more than that a year or two before that, sold right on to one hundred dollars.

The Denver, Laramie and Northwestern Railroad runs through my farm; a station on my farm, [name-] Hodgson. I gave them for right of way a strip of fifty feet, sixteen hundred feet long; they bought some additional land from me, paid me fifty dollars an acre for that. My idea was that it would benefit my property to have that there.

The 400 acres with water rights and improvements at sixty-five dollars an acre would make about $26,000. I couldn't tell just exactly what my property was assessed at for taxation in the year 1912; run from five to twenty dollars an acre in different places. I knew the assessment on my place was 120 acres at fifteen dollars an acre, making $1,800; 160 acres at five dollars an acre, making $800; 110 acres at three dollars an acre, making $330, improvements $600, making a total of $3,530.

412 I sold the three eighties in section 10 early in the spring of 1910 to a man over in Boulder. All of that was under water. The improvements on that place were a five-room house, little barn, fences, usual outhouses and [collars], laterals all over the place, worth not over five or six hundred dollars. The water rights that went with the land were four shares of the Beaman Irrigating ditch and the Milling Company; only fair water right; 1878 water; ample to irrigate all the land if properly handled. The purchase price for that land was fifty-two dollars an acre. I took some stuff over in Boulder in trade and applied it on the purchase price. I was short three or four hundred dollars on the price over there; the net result that I got was three or four hundred dollars less than fifty-two dollars an acre.

I sold the last half of the northwest quarter of section 10 last spring, with two water rights in the same ditch. The title was not in my name. It has been improved this summer, before that there was not much on it. There was on it in 1912 a small house, about twenty feet square. The water rights were two shares of water in this Beaman irrigating ditch, enough to irrigate the eighty acre tract.

There was about twenty acres of alfalfa in 1912. It was all irrigable land, but there was nothing done with it. I believe one hundred dollars would be quite a price for the improvements in 1912. I got forty dollars an acre for [for] the whole eighty acre tract. That sale was made in the spring of 1913. The [pur-] paid about five or six hundred dollars in cash, the balance on deferred payments. I suppose all will be paid in the next five or six years. They pay interest on the deferred payments. That sale included the improvements and water rights and everything that was there. That would make a total purchase price for that eighty acre tract of $3,200. I couldn't tell you just now what that land was assessed at in 1912.

I said the value of the four hundred acres on which I live was greater in 1910 than it was in 1912. All the land sold more readily than it has since that time. That is all I would base it on. For crop I don't know that there is any difference in the land, if you didn't want to sell it. I had a greater opportunity to let loose of it than I have now. I think if I had offered it for sale I could have got ten per cent more for it in 1910 than I could in 1912. I have gradually increased the improvements on the place right along. The assessment on my place in 1910 was just about the same.

Mr. Holcomb was present at that meeting in Greeley on April 30, 1912, when the taxes for 1910 and 1911 were settled. That settlement involved the settlement of the taxes for both these
413 years. As finally agreed there was a reduction of about twenty-five per cent of the taxes as charged on the roll. That was not all accounted for by the mistake which had been made in respect to the deduction of the exemption of two hundred dollars. The other two commissioners and myself had figured out that if we had to stand a suit with the railr-ad company the suit would cost the county that much, and we had better come to some settlement and try and see if we could not save a suit with the Union Pacific Railroad Company in Weld County. We also considered the delay in that amount of taxes being where we could handle it. I don't think we did for one minute take into consideration the claim that the Union Pacific was making that the assessment there was too low as compared with the assessment of its own property in the county. Yes, sir, that is what they claimed.

After the settlement was all made we talked this matter over, and we thought there should be a committee of that kind and it would be well for the assessor of the county and your assessor to go along and examine these things, that you would feel better if you would see some farms and improvements over the county. We were talking then about having three people go out and make new valuations. We were under the impression that he thought we were unjust with him, that the stuff was not assessed as high as he was in proportion, and we would like to show him. That was one reason why these people were going to be sent out to go over the county and put valuations and find property.

Yes, it is also a fact that the Union Pacific was urging that property had been omitted that ought to be assessed, and that is probably a fact in as large a county as that. The commissioners and Fischer

did feel as though there might be some loss. There is in the country, where homesteads are being deeded every year or every month in the year, and there is some of it lost.

In respect to personalty, the county commissioners felt that there was some property of that kind that was not being found by the assessor; stock driven in and fed and things of that sort. Bank accounts, moneys, notes and credits, that is something that is pretty hard to get at. I don't know anything about that; difficult property to find, but still it exists in Weld County, I expect. Perhaps one of the main reasons we had for sending out these three experts was to find property which might have been omitted, and another reason was to secure a fair valuation of all property. No sir, we haven't sent anybody out yet.

414 During the last three years, beginning with the year 1910, I never ascertained from the assessor or the treasurer what the assessed valuation upon my home place was. It was printed on my tax receipt. I have looked to see what the amount of the taxes was. I paid the taxes myself. I knew during all those years what valuation was being placed upon my property. I understood the assessor and his deputies were trying to assess property at one-third what they thought it was worth. Down in my part of the county the assessments bore about the same relation to the actual value as the assessment in my case. I think they were assessed higher further north.

I base my estimate of market value of lands in Weld County as a whole on what it will produce. I have sold now and then a farm in my part of the county in the last five or six years. To get my average I travel all over the county and see the land; see land that people are asking thirty dollars an acre for that is only worth three dollars an acre. It has sold at higher prices than I think it is worth. I don't allow my judgment to be influenced by what that kind of land sells for. Good water right is the first thing in Colorado and Weld County, dating back pretty well too; then the condition that the land is in to produce the crop is what I base my valuation on.

W. E. Bliss, witness on behalf of respondents:

Direct examination.

By Mr. Tew:

I am County Attorney of Weld County. Live at Greeley. Have lived in the vicinity of Greeley a little better than twenty-five years. I have been engaged in the farming business in the country that is called Pleasant Valley, under the No. 2 ditch.

Since the beginning of this case I have returned to Greeley for examination of the records in regard to which some testimony has been given here, and have examined some of the records pertaining to the assessment which has been described. I have also made inquiry as to such assessments respecting the considerations in deeds as to several transactions that have been described in testimony here. Since the beginning of the trial I have examined some of the described properties which have been listed in the several affidavits of

Mr. Scribner and Mr. Holcomb and the other witnesses whose affidavits have been introduced.

415 I recall the testimony of the witness Fairall in regard to a certain piece of property in Greeley said to have been sold by the Farm Investment Company to Brownfield, being the north 25 feet of lot 23 and the south 38 feet of lot 22, in Block 162, Cranfords, Greeley, at a recited consideration of seven thousand dollars, which was said to have been assessed at $450. On my visit to Greeley I ascertained what that property was. It was assessed in 1912 at $2,080. I represented the Farm Investment Company at the time the transfer was made. The consideration paid was $6,400.

I heard the testimony of the witness Fairall in regard to a so-called verified transaction E. Ryder to Charles W. Beer, the west 50 feet of lot 32, Greeley at a consideration of $1,783, as claimed by Fairall to have been assessed for a thousand for 1913. That property was assessed for one thousand dollars in 1912.

I heard the testimony of the witness Fairall in regard to certain transfers of property from the S. L. W. Ranch Company, which he said he later verified with a real estate man, Mr. Beer, and Mr. Mumper. I know where the S. L. W. Ranch is, and am acquainted with the lands. I knew what had been the policy of that company in past years in selling lands upon time payments. When I went to Greeley I had notations with me of the several transfers mentioned by Mr. Fairall of the S. L. W. lands; the numbers were as I have given to you on this list. I had already had quite a little experience in these transfers, but I went to C. D. Todd, the attorney for S. L. W. Company, and obtained from him a copy of the contract upon which all of those pieces of land were sold, and I found from his records that all of those transfers mentioned by Mr. Fairall were made in the year- 1907 and 1908, and that very small payments were made, and in some cases no payment at all, when the contract was entered into. I have a copy of that contract, and one of the conditions upon which that contract was entered into is listed under the word "Third. In consideration of the small amount of initial payment made upon said premises, the party of the second part agrees to place upon said premises, within blank months from the date hereof, as a part of the consideration of this agreement of purchase the following improvements." Of the contracts entered into in 1907 and 1908, over fifty per cent defaulted and failed to carry them out, and those contracts were in a large part taken up by subsequent persons who would enter into the contract just where the previous contractor had stopped it, so that the people who got the lands finally had taken advantage of the payments made by the first purchasers, so they received

416 the lands cheaper than recited in the deeds. Some time during last spring, I think it was, during the month of March, the Company adopted a new policy of issuing deeds or conveying the property to the contractors by deeds and taking back a mortgage. That is the way these transactions were all made. This list of transactions were all during the spring of 1913, and I believe it was during the month of March.

I am acquainted with the location and character generally of the

land and improvements that Harris once owned, which is the west half of the southwest quarter; the southeast quarter of the southwest quarter of section 2, the northeast and south half of three, township 4, range 63, 600 acres, described in Mr. Scribner's affidavit as sold on November 27, 1910, for $60,000, and assessed at $3,330. I don't know the land personally; I know about where it is located. I know some of the circumstances that surrounded that transaction. A consideration of $60,000 in cash was not paid. I know more about the transaction immediately prior to this one, so that I know by that about what was received here. C. E. Harris of Masters, was formerly the owner of that ranch, and about 30 to 60 days prior to this transfer listed in Mr. Scribner's affidavit being made, Harris traded that property to Mr. Bender, and for that property he received some lots in Windsor, Colorado, subject to a mortgage, some property up by Wellington, Colorado, subject to a mortgage, some property in East Greeley subject to a mortgage and some property in the San Luis Valley subject to a mortgage. The property at Windsor he was never able to get a deed for at all. The property in the San Luis Valley he let go back on the mortgage, and the property in East Greeley he has never been able to do anything with, stands subject to a mortgage for all it is worth. The property at Wellington he has tried to pay out on that; that is an eighty-acre farm, subject to a mortgage for all it is worth. And he also obtained a stock of goods, known as the Bender stock in Greeley, that he later combined with the Charley Lofgren stock, and the stock of merchandise he took from Bender he took subject to all the encumbrances thereon and assumed the encumbrances and agreed to pay them. He had to pay something over nine thousand dollars for encumbrances on that stock, and then he combined that stock with the Lofgren stock and lost it entirely, and it cost him between five and six hundred dollars in getting out of the combination. And besides that property he obtained a mortgage upon this land described by Mr. Scribner for $28,000. During the spring of 1913 he came to see me about
417 foreclosing that mortgage. The mortgage was given by people living in Iowa, and he said he didn't want to foreclose unless he could get personal service on those parties, because the land wasn't worth the $28,000.

The transfer of the northeast quarter of section 5-6-67, 160 acres, deed dated 10/5/10, said to be recorded in Book 337, page 444, having a consideration recited as reported in Mr. Scribner's affidavit of $25,000, and the assessment was $2,120, is from M. J. Sadler to N. F. Loving. That transfer was made subject to certain incumbrances, which were held by the Farm Investment Company. In June or July, 1911, we started foreclosure of these incumbrances. I represented the Farm Investment Company. At the sale held in January, 1913, that property was bid in for sixty-five hundred and some odd dollars, and a few days after the sale the purchaser got a quit claim deed from the equity owner for $125, so he obtained the title to that property for sixty-six hundred and some dollars.

The foreclosure of the mortgage on the north half of the southeast quarter of section 3, township 1, range 68, date of deed said

to be 1/28/11, recorded in book 337, page 538, consideration said to be in Scribner's affidavit $8,000, and the assessment being $450, which was from J. E. Brown to E. E. Love, started in June 1912, and the sale was advertised in October 1912, and Mr. Love, the holder of the mortgage, bid the property in for seventeen hundred and some odd dollars, with the understanding between himself and the mortgagor that he should bid the property in at enough to pay the entire amount of the note and the costs, so there would be no bankruptcy judgment; therefore having the use of the place during the running of the period of redemption.

I know something about the transaction on the South half of 17-7-64, recorded in book 341, and about the recited consideration of $7,000, and the assessed valuation of $1,600, said to have been sold by Thompson to Condon. Mr. Condon explained to me the entire circumstances of that transfer, and these circumstances were that he and Mr. Thompson were in partnership in ownership of some land in the Greeley-Poudre district, and in dividing up that partnership Mr. Thompson deeded this piece of land to Condon, and that consideration was recited, although there was no money changed hands, just deed for deed. I know something about the values of lands in the Greeley-Poudre district. It had a value in 1912 of $1,600, but not of $7,000 as recited in the deed.

418 I remember the transfer, and the recital in Mr. Scribner's affidavit, of the northeast quarter of section 28, township 6, range 64, sold by Cook to Sherman, book 341, page 227, that recited a consideration of $25,000 said to have been assessed at $4,060. I looked up that transaction and I think I have correct data as to what it was. Mr. Cook traded that property to Mr. Sherman, and instead of getting cash—he did get some cash, how much I don't know—he took two pieces of property in Greeley, one of them located near the corner of 12th street and 12th avenue upon which there was a couple of old small houses, and the other located on east Main street near the Cache la Poudre River, that is now used and has been for several years by the city as the dump yards, of no value to speak of at all.

I know something about a transaction, W. H. Ross to George Nicks, a deed of November 5, 1909, book 311, page 468, the northeast quarter of 29-7-64, as stated in the Holcomb affidavit, sold for $6,400 and verified by Weisel. Mr. Nicks informed me himself that he bought that land three or four years ago, and had about fifteen hundred dollars in cash that he paid down on it besides that he had his farm outfit. Since that time he has gone behind or lost money each year; and during this last spring he had to deed the place back to the person holding the mortgage, and he is now renting the farm and tilling it.

I have in my possession books which show all the deeds that were taken off the records of Weld County, warranty deeds and otherwise, in the year 1912. There are between seventeen and eighteen hundred transfers by warranty deed. I have looked over the affidavit of Mr. Scribner that is introduced here in regard to the character and number of transfers that were chosen to be put into the Scribner

list. For the year 1912 there are no guardian deeds listed in the Scribner affidavit. He has taken no deeds with a nominal consideration, and the deeds that he has taken from the records are those bearing the large and what appear to me, from knowing the property, to be of fictitious considerations. As a general thing, any deeds recorded during 1912 conveying lands in the range country have a consideration recited far in excess of what they are worth or what they sold at, in my opinion. There are in those records quite a few deeds showing low considerations on those lands, like $150 for an eighty or a quarter. I did not find any that are selected or inserted in Mr. Scribner's affidavit.

I am acquainted with the Greeley-Poudre Irrigation district, and know of sales being made in the district. During the month of March, 1911, the Laramie-Poudre Reservoir and Irrigation
419 Company, the company that had the contract to do the construction work, became financially [embar-assed] and the work stopped. I and my family have lands that we bought to speculate on in that district. The last piece of land we bought in that district we paid $24 an acre for. I bought it for my brother. That land has no sale value now, you cannot sell it at any price. You can get as good land as there is in that district for two and a half an acre, but you cannot sell it now. The works are not done, and very poor prospect of them ever being finished. I represent six claimants who did work on the district and did not get paid, aggregating something better than fifty thousand dollars in claims against the works in that district. There are about three hundred thousand dollars of lien claims against these works, including that McIlwee tunnel. There are about 185 to 190 thousand of bonds of the Laramie-Poudre Reservoir and Irrigation Company outstanding besides these district bonds, upon these same works. There is $125,000 of bonds of the Poudre Valley Reservoir Company outstanding that cover the Poudre Valley Ditch, one of the necessary links of the Greeley-Poudre District system. Those bonds have defaulted in interest since December, 1911, I think. The works were completed in stages so that the system could not be put in operation, and it would cost pretty close to a million dollars to complete the system so that water could be run to the lands. These lands are now in a raw prairie state, except the few that have been broken up with the expectation of having water. The value that made the selling price was entirely speculative. The greater part of the land that was sold there was sold to eastern people and there have been quite a few suits instituted or threatened, and a couple I know of started, for fraud in misrepresentations of lands in that district. You cannot borrow a thing on those lands.

I farm in the Pleasant Valley, about a mile and a half from Greeley. That land under the No. 2 Ditch in Pleasant Valley, within two or three miles of Greeley, is considered the best land that there is in Weld County, so far as I know. I don't know of any that is better. I have farmed several years myself, and then I have owned land there and rented it out. On a rental basis, after deducting expenses, the lands in that vicinity will return an income of

six per cent on a valuation all the way from one hundred or a hundred and twenty dollars per acre, in Pleasant Valley. I think that land is assessed at about forty dollars an acre for irrigated acres.

The roads are not taken out in the assessment of irrigated lands in Weld County.

420 It takes a great many years under a new ditch to reclaim an area from prairie after the ditch is built up to a farm that will return value. You grow up with the lands, until now it does not take quite so long to bring land under cultivation on account of the new methods of constructing ditches, and being more familiar with irrigation. The land must be broken and tilled to crop for three or four years before it is any good. You must construct laterals; takes several years to find just where they should be and get your land in shape. There are no laterals built yet in the Laramie-Poudre [Dictrict]. There is one lateral what we call the Central lateral, although it is one of the main ditches; it has had some construction on it. There is not any part of the whole district fully completed, the tunnel is the nearest completed of anything, but that does not connect with the river on the west side; it will take at least ten [*of*] fifteen thousand dollars to connect with the Laramie River. There is a suit pending between the state of Wyoming and the state of Colorado trying to keep the Greeley-Poudre Irrigation district from diverting the water from the Laramie River.

Without the tunnel and the Laramie River water, there is not water for any number of acres at all. The only water there is in excess of the Poudre River at the present time is the flood water that comes that way about two or three times in the latter part of June. The only way that can be utilized would be to build a channel reservoir in the Cache la Poudre River. That would cost, approximately, as estimated by the engineers, five hundred thousand dollars. No work at all has been done on it except the survey.

I have examined the records to ascertain if there were any lands in township 10, range 62 assessed at a righer rate than three dollars per acre, grazing lands, what is called the Bunder and Adams ranch in that township. They are assessed all the way from one dollar to ten dollars an acre. The west half of the northwest quarter of section 8, being 80 acres, is assessed at $10 per acre, and the south half of section 8, township 10, range 62, is assessed for the entire 320 acres at $3,520. There are several tracts in there assessed at $5 an acre.

I have examined the biennial report of the State Board of Land Commissioners, and particularly page 12 thereof, concerning the public building lands, in Weld County in 1912 which were leased. In Weld County there were leased 2,320 acres; rental return, according to the report, was $175.20, being about seven and a half cents an acre. I have examined in that same report between

421 pages 18 and 19, the insert showing the statement of leases in the state, and in particular in regard to the total number of acres leased in Weld County for agricultural prices and the price. In 1912, according to this report, there were leased 6,591.79 acres

3363

for agricultural purposes, for which lands they received a rental of $9,070.50 averaging about $1.37 per acre.

I have examined the first page of a bulletin issued by the 13th census of the United States, Agricultural Department, which the stenographer has marked Defendant's Exhibit No. 2. Upon that page a definition as employed by the census takers is given of a farm or farm lands. (Exhibit No. 2 offered in evidence.)

Cross-examination.

By Mr. Dorsey:

I am a lawyer. I was admitted to the bar in August, 1909. I received my legal education at the University of Michigan. I am county attorney of Weld County; was appointed on the 14th day of January, 1913. I am one of the attorneys of record for the defendants in this case. I have been actively participating in the hearing here as an attorney for the defendants.

I have lived in Weld County I think it was either twenty-five or twenty-six years last May. I and my family have been and are now large property owners in Weld County, own considerable real estate, farm land and other lands, and town property also.

Personally I have very little financial interest in winning this suit, except from a family standpoint I have of course, and from a legal standpoint of course I think we should win. From the official standpoint, the way we feel about it is that if Weld County is not assessed thirty-three and a third per cent on farm lands, we want to find it out in this hearing, and if we are not assessed as high as the railroad we want to give the railroad the advantage of it.

I gave some testimony in regard to conveyances from the S. L. W. Ranch Company to various parties concerning which Mr. Fairall had testified. The contract was made in the years 1907 and 1908 and this deed that was made and put of record in the spring of 1913 was the outcome of the contract; that is what I meant to say. When these deeds were made and [*and*] put of record in 1913, the purchasers gave back mortgages as security instead of holding under the contract. I took it that they had paid a substantial part of the consideration named in the contract.

422 I have one of these contracts. This I understand to be the standard form employed by the S. L. W. Ranch Company on these contracts. The sixth paragraph of the standard form contains provisions for forfeiting the contract in case of any default in payment, but the company has not enforced it because the price of land has been a failure all the time and they were glad to have the contracts carried out even if there were failures to make payments. It also provides that in case of such forfeiture the company may retain such sums of money as have been theretofore paid upon the contract, but when you take into consideration the kind of land and the prices they received for it, they would not gain anything by taking advantage of such payments.

What I said about fifty per cent of the contract holders having fallen down and their successors having taken advantage of what

the former contract holders had paid, I am taking that from the information given me by Mr. Todd, who is attorney for that company. I only know as he told me how many paid to the former contract holders anything on account of the payments they had made under the contract; they had paid ten dollars or something like that for an assignment of the contract. The places were either totally abandoned or taken up by new parties in more than fifty per cent of the cases. I don't mean to say that where deeds were made in 1913 in fifty per cent of such cases there had been any such transactions as I have described, but he read me quite a few names of parties who received deeds in 1913 that were not the original parties to the contract. I don't know as to those parties what they paid to the original parties in order to get their contract rights, except as he told me.

I am not familiar with the transfer from Bender to Netcaff mentioned in Mr. Scribner's affidavit but I am familiar with the Harris to Bender transfer about sixty days prior to the time Bender traded it to Netcaff; that is I have heard it was just a trade. I knew something about what the place was worth on account of the other transfer. That is the transfer Harris to Bender, where Harris took a mortgage back as described by me, and he took property in trade, including a stock of goods at Greeley. I think it was probably in February or March that I had that conversation with him concerning the foreclosure of a mortgage. He said there had been a default made on his mortgage; the mortgage was $28,000, and I think there was a payment of principal due and also a payment of interest that they defaulted in, and that if he got personal service on the party so that he would have judgment against them that
423 was good, he wanted to foreclose, but he didn't want to take the ranch back at that price. He told me he would not have it at that unless he had to take it. He did not give me an estimate of what the ranch was worth. It might be that the reason he didn't want to take it back was because he didn't want to go back to live on the ranch, although he is a rancher, that is his business. He lives on a ranch about two miles east of Wellington. I do not know what the assessed valuation on that property was in 1912. Yes, the fact remains that the assessed valuation of that property was only about one-eighth or one-ninth of the mortgage he had on it, but I gathered from him it was mortgaged for far more than it was worth. Part of the subsequent misfortunes that happened to Harris was with respect to what he did later on with property that he got in trade, except that the incumbrance that he paid on the stock goods he got was something that he assumed in the trade.

The transaction covering the transfer of the northeast quarter of section 5-6-67, purported to have been made on October 5, 1910, with a consideration of $25,000, may have taken place, but I think it is very questionable. The reason I think so is because of the idea I entertain concerning the value of the property. I investigated the property later on and found out what it was worth; that was along about January 1913. It is located northeast of Windsor. It is in the irrigated area, under the Laramie and Weld Ditch, full

water rights; the legal subdivision calls for 160 acres. I think the majority of it is irrigable, some rough land there. Improvements are very meager. As near as I could ascertain it would not pay six per cent on a $6,500 investment; that would be something better than forty dollars an acre. I think $6,500 was all the land was worth at that time. To some extent I know about the market value of lands in that vicinity. I am not familiar with particular pieces of land in that community as well as I am [—] some others. I know this about that transaction; that neither one of the parties lived in that community at all; they didn't buy it for a home. There have been some sales, where money passed, that would be as foolish as that one; it may be that that did pass.

About the transaction stated in Mr. Scribner's affidavit as having occurred on January 28, 1911, whereby the north half of the southeast quarter of section 3, township 1, range 68, sold for $8,000, I only know in a general way from examining the abstract and talking with the person that had the mortgage on that property.

I think that all told there were about seven or eight thousand
424 dollars of mortgages on there and the mortgages were all given by the party purchasing the land. The first man gave a mortgage for about twelve hundred when he purchased the land; then he sold it to some one else and they gave a mortgage back for an additional thousand, and kept that going and none of them were ever paid, and the *in-* interest was never paid on any of them until it had gone through half a dozen different hands. I do not know whether or not eight thousand dollars was actually paid by assumption of the mortgage or otherwise. I do not know what the assessed valuation on that land was in 1912. It appears from the affidavit of Mr. Scribner that the whole piece was assessed for forty-five dollars; that is more than one-third of what it is worth.

As stated to me by the abstract office, there were between seventeen and eighteen hundred warranty deeds recorded between the first day of January and the last day of December 1912. Those deeds covered every kind of property that is conveyable by warranty deed; town lands and lots and lands outside of towns, irrigated and otherwise; all classes of real property. I did not particularly make [anf] effort to find out how many deeds were recorded in that way relating to lands other than town lots and improvements thereon; there were quite a few of them relating to lands in towns and improvements thereon.

I would say I ran across four or five conveyances of a quarter section or eighty acres of range land for $150 or $250 that Mr. Scribner didn't take; and then I ran across lots of conveyances in range lands where the consideration was somewhere from three to five or six dollars an acre, or may be lower than that, that he didn't take at all. This is for 1912; from checking over my abstract and Mr. Scribner's affidavit, I took it that he took just about half of the conveyances where something other than a nominal consideration was recited. I kept track of them to see how they checked out, and it ran about half.

Yes, I also spoke of seeing a number of deeds which contained

large and fictitious considerations. For instance, the piece of land verified by Mr. Holcomb the other day for $125,000; I am acquainted with Mr. Smiley and I know about that piece of land and I know there was no such consideration. I am correct about that without question. There was another section of land, I think it was No. 7, over east of Lupton, specified at forty-seven thousand and some odd dollars, and that piece of land is practically worthless, and the party buying that traded an equity in a hardware store.
425 I have heard that he said himself he traded practically nothing for it. Then there is another piece of land traded or sold as alleged by Mr. Boles to Mr. Tarbet, in the southern part of the county, along about range 65, recited consideration $16,000. That I have been told is greatly excessive. When I say I have been told these things, I have asked parties that were acquainted with that portion of the country. And then there is land recited close to the chalk bluffs at I think $9,000 for a quarter section, and I absolutely know that it is worthless for anything except grazing land. Certainly my statement in that regard is based largely upon what I entertain as an opinion concerning the values of land. I would not pay the price that I say it would pay six per cent on, because I don't want it. That is the real foundation for the general statement that I made on direct examination, except that this range land I know I could rent from the state at about seven cents an acre and not have to pay any taxes on it. Yes, my statement in that regard is based very largely upon my judgment as to the value of some particular piece of land, but it is usually verified by the opinion of the people that are familiar with the land. There are a great many conveyances in this list attached to the affidavit of Mr. Holcomb and Mr. Scribner that I have reason to believe are erroneous, but I have only stated those that I absolutely knew of.

I own no land in Weld County now except town property. I recently owned some farm land in the Pleasant Valley country. I sold it either in the spring of 1910 or 1911, I think it was 1911. I think it is the east half of the northeast quarter of section 4, township 5, range 65; that is an eighty-acre tract. That is the only improved land that I have owned by myself in Weld County. I owned some land in Greeley-Poudre Irrigation District at one time. I bought it in November or December 1909. I sold it in February or March, 1910; it was in section 32, township 8, north of range 62. I sold it just before the bottom dropped out of sale prices.

My brother now owns the northeast quarter of section 1, township 8, north of range 63. The northeast quarter of 35, township 8, range 63; the southeast quarter of section 19, township 8, range 62, in the Greeley-Poudre Irrigation District, I think those are the descriptions as I can recall them.

Members of my own family and my relatives own quite a lot of land in Weld County. The greater part of it is owned in Pleasant Valley, just northeast of Greeley about one to two miles. As I recall them from the map, most of the land held by them
426 is in township 6, range 65, and I think it is in sections 33 and 34, and some of it is in section 4, township 5, range 65. It constitutes several farms. Most of my relatives live on those farms.

My mother Janetta Bliss, owns eighty acres, being the west half of the northeast quarter of section 4, township 5, range 65. My brother owns the east half of that same quarter; that is the one that I was formerly interested in. One of my cousins, Ernest Bliss, owns a portion of the northwest quarter of section 3, township 5, range 65. I think he has 120 acres there. Then he owns forty acres just north of that; that is a portion of the southeast quarter of section 34, township 6, range 65.

Dave Bliss owns a portion of the southeast quarter of section 33, township 6, range 65, and my mother owns a little tract of land in section 33, township 6, range 65. Wilmore Bliss owns some land a couple of miles northeast of that. I would not attempt to give the description of it. I think those lands owned by members of my family are in as good a section as there is in Weld County. It is one of the oldest irrigated sections; the water rights there are exceptionally good.

The piece of land that I owned in the Pleasant Valley and sold about a year ago I had owned for a great many years; I inherited it from my father. I sold it to my brother. He paid for it. It was improved so far as agriculture is concerned; there were no buildings at all on it. It has a fence around it. The larger part of it was in crops. I think there is approximately 65 acres now that are irrigable; the rest of it is not, because it drops off into bottom land and most of it is composed of bluffs, used for pasture land; no hay at all raised on these bottoms. There is also about three acres of it that is rough and cannot be used. I had a two-sevenths interest in it and my brother paid me three thousand dollars making at the rate of $10,500 for the entire eighty. I do not know what that property was assessed in the year 1912. 54 acres assessed at forty dollars an acre, making $2,160, and 26 acres at five dollars an acre, making $130, or a total of $2,290 for the entire property, is just about one-third of the value of it. I receive more than full value.

There have been numerous sales in the Pleasant Valley district at the rate of $200 an acre for irrigated land, but not in 1911 and 1912. Most of them occurred in 1908 and 1909, and may be in 1910. I don't know of any of the best irrigated acres changing hands at $120 an acre. I don't know of any particular piece
427 for sale right now in that district, but I know they could not sell them for more than $120 an acre unless they found some one that was desirous of locating in that particular section.

I don't know what the east half of the northeast quarter of 4 was assessed at in 1910 while I was the owner of it. According to my idea it had a greater market value in 1910 than in 1912. Now the pasture land is assessed too high.

My mother has owned her place a long time. She inherited it from my father. She has never sold it.

It is right next to this piece of ground that I was interested in. It is good land, the tillable land on it is exceptionally good. I would say there is some place from twenty-five to thirty acres of tillable land; the balance is pasture land. I think there is a little more than fifty acres that is not tillable. My mother owns just water enough

for the particular land that you can till. Part of the other fifty acres lies in bluffs and part of it on the bottom with a big slough in it. I would say the total value of the improvements on the place in the year 1912 was about three hundred dollars. I have not the least idea what that place was assessed for in 1912. 30 acres at $40 an acre, making $1,200, 50 acres at $5 an acre, making $250, or $1,450 for the land, $100 for the improvements, is just about right, just about one-third. That is according to my notion that the best land is not worth more than $120 an acre. It is assessed at one-third of what it will pay dividends. I think these assessments ought to be made on the basis of what dividends you could get out of a place; that is my opinion of the way to value land. As to sale price, that same property was worth more in 1910 than in 1912; I don't believe it is market value. My definition of market value is what a piece of land is worth, not what some one that is not familiar with it might pay for it.

I don't know really what the definition of intrinsic value is. I think it would be about the same as market value. There might be a difference; depends on circumstances entirely.

I [expect] that thirty acres picked out of that piece as irrigable land could have been sold in 1910 at $200 an acre. I think it was assessed in 1910 probably the same as it was in 1912; had the same value in 1912 that it did in 1910 from a producing standpoint, according to my definition of value, because I based my opinion on a period of years; not any particular year. I base it not on sale price, but on productiveness of the land.

428 I think that land was worth as much in 1909 as it was in 1910. At any rate there wasn't any less land irrigable in 1910 than in 1909. There was more, if anything.

The land that I owned myself in the Greeley-Poudre Irrigation District I bought about the first of December, 1909, and sold it in 1910. I had one-half interest in 240 acres. It was burdened with the lien of the outstanding bonds when I sold it to the extent of something like twenty-five dollars an acre. I think we paid twenty dollars an acre for it, and we sold it at the rate of about twenty-two dollars an acre. That is what we got net exclusive of the bond lien upon it. They paid us and took the land with the bond lien upon it. The wife of Mr. Tew, who is co-counsel with me for the defendants in this case, was interested with me in that property. That place did not have any improvements on it; not a thing. I expect it was assessed at about two dollars an acre in 1909; I think about the same in 1910. Two dollars an acre in 1912 is a plenty.

I know land in the vicinity of the Boye place in section 35, township 6, range 65, but I don't know that particular piece. It is close by the land owned by my family in the Pleasant Valley district; section 34 lies between. It is about the same character as the land my family own in Pleasant Valley. It doesn't have as good water rights. I never heard of the sale of that eighty-acre tract of land on May 24, 1911, for seventeen thousand dollars.

The east half of the southeast quarter of section 33, is owned by Dave Bliss I think, if I have the proper description. That is an improved farm. I think it is all irrigable. I would say the improvements there are worth a thousand dollars. The land itself is like the

other land that I described with the exception it is not quite so valuable for the reason some of it is very hard to irrigate. It was worth more as far as selling price is concerned, in 1910 than in 1912; according to my idea of value it was worth about the same in each of these years, it is worth the same one year as it is another, [*form*] a valuable standpoint. I think forty dollars an acre assessment in 1910, and the same in 1912, is a little high along side of my mother's land that you spoke of.

I know of a sale of the west half of the southeast quarter of section 28, township [—], range 65, which was made in March, 1910, M. Sanger was the seller and Charles Willis the purchaser. That was just a mile north of where my mother lives. That was a sale of an eighty-acre tract of land, very similar in character to the lands that my mother and my cousin and I had down below there. Im-
429 provements just medium. I think all of that is irrigable. I think that brought twenty-three thousand dollars at that sale. I presume it is assessed at forty dollars an acre, the same as other land in that vicinity. I presume it was assessed at that rate in 1909, 1910, 1911 and 1912. That is what you term a freak sale. There have been several of those sales around the country, but that was during 1909 and 1910; they do not make those sales any more. Charles Willis was a representative of that county; lived there a long time; he should be a good judge of the value of lands.

Ernest Bliss owns the east half of the west half of the southwest quarter of section 33-6-65; forty acre tract a half mile long. That is the same general character as these other lands. Same general character as to water rights also. I think it is all irrigable every acre. The improvements are, I think, a fence around it; it is fenced in with the entire eighty. I expect it was assessed in 1912 at forty dollars an acre. I presume it has been the same there for a good many years. I do not know about a sale on May 24, 1910, of Ira Sherman to Sarah Bogard, the south half of the southeast quarter of section 35, township 6, range 65. I believe I have known that piece of property, but I am not certain. I am not acquainted with the parties. That is, taking the whole eighty acres, a pretty good place. There must be fifteen or twenty acres of it they had in Sand Creek, that is a pasture, and the balance of it is irrigable. So far as the irrigable land is concerned, it is of like character as ours. I knew the place was sold but didn't know the names of the parties. It was another one of those sales. They were strangers in the county. I presume that the tillable acres of that land was assessed in 1910 at forty dollars. It may be correct that 75 acres were assessed at $30 an acre and five at $4 an acre; I am inclined to think there is more of that in pasture than five acres. That land has a mortgage on it for twelve thousand dollars; that was taken as part of the purchase price; it is not worth the amount of the mortgage. I am speaking of my theory of productive value and from my experience through 1912 and 1913 of what has actually happened with the people that had mortgages on the land.

The east half of the northwest quarter and the west half of the northeast quarter of section 21, township 6, range 65, 160 acre tract, sold by S. Hopkins to William H. Henderson, I know that well. That is in our neighborhood there; land of like character as ours.

They have only river water and reservoir water. That is an
430 improved farm. No question but $38,000 is a very high rate *per acre* for that 160 acres. At the rate of $30 per acre in 1910, it was assessed low. It should have been assessed at $40 an acre, but that piece of property will not pay dividends on more than $120 an acre, including improvements. $40 an acre in 1912 was about correct; if measured by the sale price it is not correct, but if measured by the return value it is correct. I know all of these parties, S. Hopkins and W. H. Henderson. William H. Henderson is the grantee. He is a resident of Weld County; has resided in Weld County off and on for a good many years. He has been a farmer. He should be a fairly good judge of the value of lands in Weld County off and on for a good many years. He has been a farmer people in general is that he paid a great deal more than it was worth.

I am familiar with the east half of the northwest quarter of section 21-6-65; that is part of the same tract; W. H. Henderson deeded that on April 1, 1910 to W. E. Benton. Henderson and Benton bought that place together, and after they had the transfer they split it up into 80s. I am acquainted with all the parties and the place. The consideration in that deed was $21,000. I think that was the correct consideration. Benton is a man that has lived around Weld County for quite a while; his business is farmer, and he should be a fairly good judge of the value of lands. He actually paid $21,000 for that land, and he is sorry for it now: he has told me so. That should have been assessed at $40 an acre, in my opinion, in 1909. It was worth more in 1910 so far as the sales price is concerned.

In arriving at what I call the productive value of land, I base that on a capitalization at some rate of interest of the net proceeds realized from the farm operations. By net proceeds I mean what the owner of the land will receive clear on that land. I deduct from the gross proceeds the taxes, water assessment, incidental expenses, such as repairing barns, the fences and the house, or buying alfalfa seed for the place. What I am talking about is the land farmed by tenants. That land is farmed on shares as a rule. When I figure out this return, in the first place I take out the share that goes to the tenant. My testimony was based entirely on what the owner of the land, who rents it out to others to farm it on shares, himself gets. I didn't take into account anything the tenant got out of it. In farming on shares the land owner gets one-third of the potatoes, one-third of the grain, one-half of the alfalfa, one-fourth of the beets and one-fourth of the cabbage, sometimes one-fifth and he pays taxes, furnishes alfalfa seed for the place
431 and he pays for material to repair fences and buildings. I think if a man owned a good farm in the Pleasant Valley in Weld County and lived on it and farmed it in good shape, he would make all of his expenses and interest on his money at about the rate of $120 an acre. I don't mean that includes all the living expenses of himself and family. I mean what is necessary in connection with the farm.

Redirect examination.

By Mr. Tew:

I have become familiar with a great many foreclosures of mortgages which had been given as part of the purchase of irrigated lands in Weld County. Commencing with the fall of 1911 foreclosures became very prominent; a great many through the winter of 1911 and 1912, and went through the year 1912, both through the courts and by the public trustee. During the winter of 1912 it was a very frequent occurrence for the mortgagor to try to convey his property in satisfaction of the note.

C. M. IRELAND, witness on behalf of defendants.

Direct examination.

By Mr. Tew:

My name is C. M. Ireland; I live at Hudson in Weld County; have lived there since 1878, and have been engaged in the stock business mostly. I have farmed to some extent, under some of the old ditches.

I am acquainted with land under the old ditches taking water from the Platte River and tributaries from Brighton to the mouth of the Poudre; have been acquainted with that country and territory all my life pretty near. I was born at Fort Lupton in 1867, and have had more or less to do with such things at all times; more in the last seven or eight years. I have paid more attention to such things the last ten years, say. I have had something to do with buying and selling lands in the Henrylyn district.

I know every acre of the land that lies in what is known as the Denver-Greeley Valley irrigation district. I have in the stock business rented lands for grazing purposes. I have rented school lands at five cents an acre. I know what I have paid as rental for those grazing lands from the state has been five cents an acre; I guess in different localities prices vary some. I have rented until just a few years ago mostly railroad lands from the Union Pacific.

I think at that time the price was $13.80 a section.

432 The Henrylyn district has all hard lands, while in the Greeley Valley district is composed mostly of sand hills. Most all of them are in prairie state as yet. A few have been broken up and farmed a little. In 1912 there was a few acres broken up and farmed in the Henrylyn district also the Greeley Valley. There is lots of difference in the character of the lands that lie in the Denver-Greeley Valley district, as to the main portion of the Henrylyn as to fitness for irrigation. Out of sixty-odd thousand acres in Greeley Valley I would not say there was anywhere near half fit for irrigation. The land is scattered all around; lies between the irrigated lands and the place from which the water must flow to it by gravity; sand hills, and very bad sand, some of it blowy sand.

I think in 1910 the ditches through which water has been endeavored to be flowed for this Denver-Greeley Valley were con-

structed running down to near the river past Milton Lake, but in 1911 they were full of sand for several miles. I think they spent a good deal of money cleaning out to run water in 1912. They were unable to get water more than a mile past Hudson as the ditches again filled up with sand. They do not carry at all where they have blowed in. [Them] sandhills are there just as they have always been, just fitted for grazing. After they are broken, whatever you can put in them will cover up so deep it will never [some] out, and it will destroy the pasture for which they are now fitted. Grazing is all they are fitted for that I can see.

I think I know the full value for grazing purposes of lands such as are in the Denver-Greeley Valley and Henrylyn districts; I don't think they would be worth more than two or three dollars per acre for grazing purposes.

I was a member of the board of directors of the Henrylyn district. About the year 1910 the plan for service with water of the Henrylyn was to construct a tunnel through the Continental Divide, bringing the water from the western slope, also what flood waters would be available from the South Platte River; a system of reservoirs, which is now built, and the ditches are built; and we only have the water supply from the Platte River which is not enough for all the lands, anywhere near.

In 1910 the Government intervened and I believe have a case in this Court now to prevent the construction of the tunnel any farther. Prior to this prevention there was a contract let for this whole system. It never was carried out. Of deeded lands there is about 30,000 acres of the Henrylyn that was to be served. It was planned to serve ninety thousand acres altogether.

433 There are three million six hundred thousand of bonds of the district now outstanding. They bear interest at six per cent. I don't think there is water available for the 30,000 acres, assuming the tunnel is not constructed. The bond burden per acre of 30,000 acres would be $120. Per year that would be interest and maintenance charge of about $9 per acre. The project is in an uncompleted condition and will never give results until we get more water.

Probably five or six thousand acres of the land in the district have been broken up. It has been cropped in a way. I cropped some of the land in 1912 and 1913. I lost money on it. The cause of that was shortage of water.

To change the lands from the arid waste state into productivity, it requires the spending of lots of money. It costs $3 an acre to break it, and it costs as much more to prepare it for a crop. People didn't get on an average more than ten or twelve bushels per acre this year; I didn't and I had in crop in the neighborhood of a couple thousand acres.

There has been a great many prospective sales and speculative sales made in that vicinity at prices higher than range price values. A great many trades have been made, and a good many people have come in there to buy and the owner was glad to get them in and

give them most any kind of terms to help develop the land, and we took one hundred dollars or two down with the contract that they promised to pay certain prices for this land within a couple or three years; they would promise to pay a pretty good price, but it wasn't a real value of the land.

I used to own the southeast of 32-2-64, the west half of 26-2-64, all of 25-2-65 and all of 35-2-65. All of 35 is sandhills; the west half of 26 all sandhills; all of 25 except about 200 acres is sandhills and Boxelder Creek; cannot be farmed in my opinion. It is range land.

I have had acquaintance with a number of transactions that have been made in regard to land such as I have described in that vicinity. I know a Mr. Stiber and Mr. Kearns. They live in Denver. The Kearns Investment Company is Stiber and Kearns. If there was a transfer of that land on February 20, 1911, with the recited consideration of $10,000 it is transferred [-] one company to another, and they both consist of the same company.

434 I think $2 an acre for that property in 1912 is a just assessment. I think it is enough for that land. It is certain no man could pay more for that and ever get out of it without he speculate in some way.

I know the location of the northeast of section 10-1 north, range 62. It is right straight east of Hudson about twelve miles, in a range country. I have seen them recently I would say the value of that land in 1910 or 1912, was one or two dollars an acre. It is up above no hope of being broken. It is not in the district. It is up on a hill; there isn't enough vegetation grows on it to furnish feed for five head of cattle, just cactus land.

I am acquainted with the northeast quarter of section 14-2-65. There is some little of it that is hard ground; the major portion is sandy. It is used for pasture. In my judgment its value in 1912 was a couple of dollars an acre.

I know the northwest quarter of 32-2-62. It is about like all the land out there; prairie land suited only for pasture. Two or three dollars an acre is as much as anybody could put on it.

I am acquainted with section 7, township 2 north, range 65, which is said to have been sold for $47,361, and was assessed in 1912 at $1,920. It is sandy land, rough. A party moved on there this spring and plowed it up and put it in crop; tried to water it, and couldn't get enough to harvest. I was talking with [them] about why they didn't get onto a good hard piece of ground, and they said this piece of land didn't cost them very much; they traded an equity in a hardware business for it. There is lots to do before that land is ever fitted for irrigation, and then only a portion of it. They run water in the Speer Canal after it gets by Hudson; the sand is so bad they cannot maintain it until they cement it or do something with it. For Hudson east the sand dunes go clear down to the river. Just about the same over on the Milton over a mile past Hudson. Now and then a section is fair, scattered through; the main body of that land is sand hills.

I know where the northeast quarter of section 5-1-63 is. That is about as good land as there is in the district; cactus land, worth about two or three dollars an acre. It is prairie.

I know where the northeast of section 2-1-65 is. That is right near Hudson; all pure sand; not fitted for irrigation. It is worth really more by being located so handy there for pasture than other lands would be. I would say $3 an acre, from the way it is situated, to anybody that lives near there.

435 I am acquainted with the southwest of 25-2-63; that is in the Henrylyn; it is prairie, just like all the rest of it. The value of that is two or three dollars an acre, all you can figure on.

I am acquainted with the north half of the southeast of 34-3-65, said to have been sold in 1910 for $4,000, and was assessed at $240. That is not in any district. It is sandy, grazing land, used for that purpose now. It is not fitted for any other purpose; not worth more than two or three dollars an acre.

I know the south half of the southeast quarter of 15-1-63, said to have sold in 1910 for $4,000, and which was assessed in 1912 at $240. The value of that land in my judgment, the same as all the rest of it there, about two or three dollars an acre. That is good hard land, good soil, as good as there is anywhere. I think they plowed it up this spring.

I know the east half of the northeast quarter of 26-1-63, which was said to have been sold in 1910 for $3,600, assessed in 1912 at $240. That is good land; worth about the same as the rest of it there.

I am acquainted with the northeast quarter of the southwest quarter of 25-2-64. It is raw prairie land, value in 1912, the same as the rest of it, two or three dollars an acre.

I am acquainted some with the south half of the south half of 25-2-64. That is raw prairie.

I know where the east half of 31-1-62 is. That is prairie land. It is said to have been sold in 1910 for $4,640 and was assessed at $640. That is land that is twelve miles from the railroad; not improved a bit; no fence on it; cactus and prairie dogs. It is unbroken in every way; didn't return a penny.

I am acquainted with the east half of the northwest quarter of 34-2-63. That is located east of Queensburg about six miles. It is fenced, and this year the first crop in. They are trying to improve it, like I have been. I would say the value is no more than the rest of it.

. I am acquainted with the north half of the southeast quarter of 15-1-63. That is in the district. It is broken and cropped this year. The value is the same as the other; I don't see any difference in any of that land that you can mention in that district.

I am acquainted with the west half of the northwest quarter of 14-2-65. It is sandy; not fitted for irrigation; used for
436 pasture; value in 1912 same as the rest of it. I am acquainted with the lands in section 26-1-63. They are broken up this year. I know where the northwest quarter of 27-2-62 is. The character of that land is just like the rest of it.

I was the assessor for five years. I had townships 1 and 2, range

66 to 61; all of the land east of the Platte river in townships 1 and 2. I have carefully gone over these lands in making my assessments. There are several classes and character of land that lie under the old proven ditches. Some land that is better farmed, better developed than others. There is lots of land along there that has never even had alfalfa on it; it is worn out; also lands there that have never been farmed at all; used for pasture, mixed with the farms, which makes it when you come to assess it you have to look it over pretty well in order to get a just assessment. And lots of cases you don't get a just assessment; you are in a hurry and don't do it as accurately as you ought to; and it requires a good deal more care and investigation than most people give it.

The value varies from year to year; some land keeps decreasing in value on account of seepage.

I think I am acquainted with the value of the lands that are irrigated under the old proven ditches throughout Weld County. I think the average value per acre would run from $25 to $125, and I think there is more $25 land than there is $125 land. That is inclusive of water and improvements, and I think the average throughout $50 would be fair, and in my judgment would be about right, take the 266,000 acres, I think something like that.

Cross-examination.

By Mr. Dorsey:

I have lived in the neighborhood of Hudson off and on since 1878. I am not engaged in the stock business much any more; I have got a lot of land. I can gave you approximately a descriptpion of all the land I own in Weld County. There is the northeast quarter of 12-1 north, 65; the southeast quarter of 18-1 north, 64; the south half of the south half of 24-2-65. That is all 2-65 in place of 1. The west half and the southeast of 30-2-64, I think 120 acres in the northeast quarter of 3-1-64; the northeast quarter of 26-2-65; the southwest of 2-1-65, all but, I think 20 or 30 acres; and the northwest of the southwest and the west half of the southwest of the southwest of 3, but 60 acres, township 1-65. That is all I hold title to. I am interested in quite a bit more; in the names of other people, which I am interested in. The west half of 6-1-64 and the north half 1-1-65; that is all I think of, there might be more.

437 I have sold some land within the last few years. I think I sold ten acres in the spring of 1913, in the southwest of 2-1-65; the purchase price of that land I think was $100 an acre. That is the last sale I have made. I have made no other sales within the last three years. I have made some contracts, I don't consider them sales. I have listed my land with a corporation to sell, and they have sold some contracts, I don't know how many. I have nothing to do with it until I have to give a deed. I have listed just what is around the town of Hudson; most of it is in the town; this ten acres is right in the town. I listed them with The Denver-Hudson Development Company. I have listed my lands with this corporation at one hundred dollars an acre, stuff in town; they could

make town lots out of it if they wanted to; within a block of the depot.

I am not getting much use of this body of land that I own. I have plowed up a good deal of it. I expect to sell it if the time ever comes when I can. It is in the irrigation district and bonded. It is pretty hard to sell it until we get a water supply. I have tried to farm it, tried to raise enough money to pay taxes with, so far I have not succeeded. I have not been able to pay my 1912 taxes yet.

I expect to get for that land when I do sell more than three or four or five dollars an acre on the average clear through. That is one reason I am holding on to it. The expectation I have is based upon my belief that these irrigation works are going to be completed, and when completed I think it is as good land as they have in Weld County; is valuable when put in a high state of cultivation. Some of it is sand hills; the north half of 1 is all sandy. Portions of that can be developed perhaps when there is plenty of water: portions never will be. This sandy land that I described in answer to certain questions of Mr. Tew is not, generally speaking, the character of lands in that district. Most of the land in the Henrylyn district is as good as there is in Weld County. The Greeley Valley district is most all composed of sandy stuff. My land is in the Henrylyn district.

I fully anticipate that these works are going to be completed so as to put my land under irrigation; I guess I am the biggest believer in that of anybody. I have worked with it since 1907. With that full belief in my mind, I wouldn't want to offer to sell at an average of $10 an acre unless I found somebody that was willing to buy. I first would want to know if he meant business, then I would talk business with him. I might not take that and I might take less.

438 I am not prepared to say that I would or would not take $10 an acre on the average for the lands I own in the district. The lands I spoke about as having rented from the Union Pacific at $13.80 a section; that was along since 1900, 1901 and 1902, along there, and before that. It was out near Hudson. Some of it was in the Henrylyn District, some outside. Some of it in the Greeley Valley.

The value of two or three dollars an acre I have to the long list of lands Mr. Tew went over was for pasture purposes. A good many of them were in the Henrylyn District. I put the same values on the lands in the Henrylyn district as on the lands outside of it. In putting that value on the lands I took account of the prospect of getting water on the lands in the district. I think when this system is completed that these lands will be more valuable, but at the present time, he was talking about, there is no more value. My idea of value was based upon what you can do with the land right now, without taking into consideration at all the prospective value or the value which arises, if any, from this prospective water supply. I take into consideration what the land will produce to pay these taxes with. According to my idea the full cash value is two or three dollars an acre. I fix that with respect to what can be realized from using the lands solely for purposes of pasture. I wouldn't be surprised if that land

will be worth $100 an acre; I don't know why it will not be as valuable land as there is in Weld County when this time comes.

This land is now bonded for $3,600,000, bonds outstanding; that on the deeded land would be about $120 an acre. It is contemplated that there will be 90,000 acres, which would make $40 an acre. These bonds were sold, and thereby the money was obtained to do the work. Somebody bought them; and they are secured by this land which I say is worth two or three dollars an acre, at the rate of not less than $40 an acre, and more if you take only the present deeded land. The people who bought these bonds knew the land wasn't worth but two or three dollars an acre when they furnished $40 on it, or $120. They knew just what the land was worth at that time, expecting to make it worth more. $3,600,000 has already been expended of the money raised for the Henrylyn district. I cannot say that the expenditure of that money has benefitted the lands at all.

I think it is important for those who hold lands in that district not to magnify the present values of the lands because it increases their burdens in the way of taxes if they do.

439 I have owned my land in that region since 1893 and 1894. I have acquired none of it since the Henrylyn project was inaugurated. I was one of the projectors of the Henrylyn project; it was because I had these lands there. I purchased this land from various people. I have bought some from the state; that is one particular piece of land I purchased since the Henrylyn district was organized. I purchased it with the idea that eventually I would be able to procure water to irrigate the land; and for that reason I went into this Henrylyn project.

I don't know that this ten acres in the southwest quarter of 2-1-65 that I sold for $100 an acre was worth as much in 1912; the town is increasing and prospects look a little better for the town in every way. I think it was assessed in 1912 at $2 an acre.

The acreage of land under water in the Henrylyn district is increasing a little every year. It increases a little all the time. They have portions of water all over, but not enough for all the lands. Everybody will get less water every year until the tunnel is built, because more land will be plowed up, and will take more water from the other fellow all the time. I believe when the tunnel is built there will be enough water to irrigate 90,000 acres. No work is being done on the tunnel now.

I own the entire southwest quarter of 2-1-65. I think it was assessed in 1912 at a couple dollars an acre, the same as all the land around there. It may be a good many years before I get another fellow to give me a $100 an acre; that was an accidental sale. I think Hudson will make a good town some time.

I was deputy assessor, I believe, in 1902 to 1907. I have not been deputy assessor under Fischer.

Yes sir, I think, sales of land have been made in the Henrylyn district in large numbers and covering large amounts of land at greater than these range values; I don't think there is any new sales made as cheap as that. There has been a large number of

sales in the district in the series of years during which this Henrylyn project has been in mind. A large number went back, didn't make good. I don't know any that was sold three or four years ago that stuck.

I have known of sales of Government lands in the Henrylyn district within the last three years, if a man would sell a relinquishment, at two or three dollars an acre. There have been quite
440 a few of them. Those were desert lands. He had to pay the same as deeded land to get the water on it. Unless he did get water on it he would not get title.

I do not know of any sales of deeded land at two or three dollars an acre since the district got under way. The district was organized in 1907. Since 1907 there have been no sales of deeded lands at two or three dollars an acre to my knowledge. There has been some sold for $5 that I know of. You could have bought half the district for that at one time, in 1908. Since 1908 the price of lands, of course, went up. I don't know of any sales since 1908 at the rate of $10 an acre or less.

I have visited various irrigation districts and irrigated lands in Weld County during the last few years, and have general knowledge of it. I have not dealt in lands anywhere except in the vicinity of this Henrylyn district, any more than I have went from one place to another, and naturally find out all I could about that part of the country. I have looked at the lands. I do not know anything particularly about what lands are selling for in other parts of the county. You often hear of a sale being made. I am rather familiar with the lands in what is called the Pleasant Valley. I have been through there several times. I guess sometimes lands in the Pleasant Valley district, irrigated lands, sell as high as a couple hundred dollars an acre; possibly more than that; sometimes less. I have no actual knowledge of conveyances and prices paid for lands [*an*] the market for lands of that character. My knowledge is just from what I have gathered from looking around and inquiring one way and another. My statement of an average value of $50 an acre for all the irrigated lands in Weld County, excluding all waste and seeped land and everything of that character, is just my opinion of it, that is all.

There was some state land within the boundaries of the Henrylyn district. Some of it has been sold at auction. I know there was some sales. I know there was a sale of the northeast quarter of section 16-2-64, but I don't recollect just what it sold for. I know that section 16. It is about the same as the other lands there; good section.

I know section 36, township 1, range 65. I did not know that at that auction sale on January 5, 1910, the northwest quarter of that section sold at the rate of $25.50 per acre, the northwest quarter at the rate of $20.50 per acre, the southwest quarter at the rate
441 $20 per acre and the southeast quarter at the rate of $19 per acre; I knew it sold. That section is about the same as an average section in that district.

I know about where section 17, township 2, range 62 is. That

is not in the district. That is in the sand country that I was talking about. I didn't know that at the auction sale of state lands held January 5, 1910, the southwest quarter of the southeast quarter of that section sold at the rate of $10 an acre. It ain't worth more than a dollar an acre. I wouldn't give that for it. The land that sold for $20 to $29 an acre in section 36, is what I say [is] worth two or three dollars an acre.

THOMAS A. RYAN, Witness on behalf of respondents.

Direct examination.

By Mr. Tew:

My name is Thomas A. Ryan. I reside in Denver. Have lived here seven years. I am in the stock and bond business; work for E. F. Hutton & Company. That firm has a seat on the New York stock exchange. We have from the New York office to our office at Denver a private wire. We recite the quotations as they are given on the exchange at an office here in Denver. The firm has done that ever since they have been in business. I have been employed with them two and a half years. I keep posted generally on the different items that are bartered, sold and exchanged on the stock exchange.

I have had occasion lately to look up the average market price of the common stock and the preferred stock of the Union Pacific Railroad in the year 1911. I acquainted myself thoroughly with what the price was of that stock at the close of the market on each market day in 1911. From that I made calculations from the number of market days in that year of what was the average market price of that stock, preferred and common. I also looked up the quotations as shown on each market day of the Union Pacific general fours, bonds and Union Pacific common convertible fours, and the first refunding fours in 1911.

How I arrived at my conclusion as to the average price of Union Pacific common stock in 1911, I found out the closing price in each day and added up the total and divided by the number of days in the year that it was quoted. In 1911 Union Pacific common was quoted 297 days, but in this report there is 296 days. There is one day missing from my report; however, that day's quotation would not make a particle of difference in the average. I carefully figured out the result in the method I have mentioned.

442 The average market price per share in 1911 of Union Pacific common stock was $175.30.6. The average market price of Union Pacific stock, preferred, in 1911 which I obtained in the same way, was $92.67.6.

The average market price of Union Pacific general fours in 1911 was $100.93.6. A thousand dollar bond would amount to $1,009.36. The average value on the dollar in 1911 of Union Pacific convertible fours was $104.68.5. The market value on the dollar of Union Pacific refunding fours in 1911 was $96.98.6. I figured to make this determination the same way I did the average price of

Union Pacific preferred and Union Pacific common. I gave the last quotation of the day, sale price at the close of each market day.

Cross-examination.

By Mr. Dorsey:

I began work for Hutton & Company about April, 1911. Before that I worked for Otis & Company in Denver. I am doing clerical work in the office; handle bonds and stocks; figure up the amounts that are due to customers on sales and purchases. I do not myself keep a record of the sales on the New York stock exchange of all the securities that are dealt in there. The record on these various classes of Union Pacific securities is just the published quotations given out by the stock exchange. They give out a daily statement each day. I did not preserve these. The four or five newspaper offices in town have the records. That is where I obtained these records. I went over the files of newspapers to see what the published reports had been for each day in this year on these different kinds of securities. That is the way I got the information. I did that with an assistant; one called them off and the other put them down. I went over the files of the newspapers completely so that I sure got each day. The item that I took on each one of these different kinds of securities was the last sale which had occurred on any particular day, without regard to the number of shares or the amount of bonds involved in that particular sale. What I took down was the price paid at the sale per share, or per thousand-dollar bond or per hundred dollars of bonds, as the case might be. Having obtained that information I got my average in the manner described by Mr. Tew.

Union Pacific stock in 1911 was a pretty active security. It was dealt in very extensively on the New York stock exchange; both common and preferred. Was bought and sold at varying prices from time to time.

443 The figure I gave for the average of preferred stock for the year ending December 31, 1911, was $92.67.6. Common, $175.37.6. Bonds: general fours $100.93.6; that is to say each $100 in the shape of a bond brought on the average $100 and 93.6 cents; very close to par. Convertible fours $104.68.5 on each $100 in the shape of a bond. Union Pacific first and refunding fours $96.98.6 on each $100 of par value; less than par.

To take every sale made on the exchange each day, the number of shares that passed at any certain price, and average the whole thing for each day would be the accurate way to get the average market price of such securities as Union Pacific stocks. That I didn't do.

FRANK M. EASTLACK, a witness on behalf of respondents.

Direct examination.

By Mr. Tew:

I live at Nunn, Colorado. I am secretary of the Board of Directors of the Greeley-Poudre Irrigation District. I have been acting in that capacity ever since the organization of the district. The works of that district are not done. No water can be put through them to the lands in the district. It would be two years in November or December of this year since work on that system ceased; since any quantity of men were at work. There has been some little work since then, but nothing of any importance.

I know something about the selling price of land during the time the work was going on and the completion in prospect. It was higher formerly than it has been since the work stopped. The land in the district and outside is all about the same class of land. It is all very good land if it could be watered. It is all grazing land at the present time. The majority of it prairie land; some little broken up by homesteaders that live there.

The majority of sales of land in that district were made in 1909 and 1910; some in 1911, and there has been a few since, but not very many.

The total issue of bonds of the district is five million one hundred thousand dollars. Since December of 1912 there has been no interest paid. The Laramie-Poudre Reservoir and Irrigation Company has been trying to do the work of completing the system. D. A. Camfield is president of it. Since the work ceased they worked every conceivable plan they could obtain from Denver to New York to refinance it. They claim they are not able to get the people to buy the bonds to complete the work.

444 I am acquainted with the character and nature of the water supply that is proposed for it. That amount of land cannot be irrigated without the waters of the Laramie river if the works are completed. The right to take the water as claimed for the district from the Laramie River to the Poudre is in litigation. Neither one of the collecting ditches on the mountain side leading to the tunnel on the Laramie side is completed; partially. The cash cost of the reservoir that is needed to store water of the river on the Poudre side approximately is from $400,000 to $450,000. Nothing has been done on it, only the surveys. From the Poudre river to the McGrew reservoir they have finished all the ditches that lead from the Poudre river down to the district, except a few intervals, but there is enough intervals in there that we cannot deliver water as far as McGrew's. Then there is a large siphon across what is called Black Hollow that is not there; approximately 1100 feet long. The crossings of Union Pacific railroad are not in; neither are they in crossing the Colorado and Southern. There is a small siphon in at the crossing of Boxelder creek near Wellington, but it isn't large enough for the capacity of the ditch. It is necessary to somewhat enlarge the Poudre Valley ditch at the upper end of the system to get water through. It is not done.

That ditch is bonded for $125,000, about two years' defaulted interest on it. The aggregate of that debt is a little over $150,000. The bondholders are threatening foreclosure. If the bonds are foreclosed the district couldn't get water to the lands from the Poudre river or from the Laramie river unless they could get that ditch, except by building another one. That is not feasible.

There are $188,000 of bonds outstanding yet against the properties of the Laramie-Poudre company that has contracted to sell works and water rights. There was an issue of $350,000, a portion of which has been taken up.

There are old irrigation rights on the Laramie river that are necessary to afford to the district a water supply if its works are completed. There are three places we have found that are under mortgage, two of which the district has had to take care of themselves. The bonds of the Laramie-Poudre Company are upon these lands and water rights. There is approximately $320,000 of the moneys that were contracted to be paid by the Laramie-Poudre Company to builders of these works unpaid. They are not all in the form of liens; most of them have been filed. As to transcripts of judgments, there
445 were some liens for some of these bonds filed; I couldn't give you the aggregate amount. The judgments are liens against the district works and lands; all property belonging to the Laramie-Poudre company that has not been transferred. The title to the property rests still in the Laramie-Poudre company. The provisions of the contract were that it was to come to the district on completion of the system.

None of the laterals east of McGree are done on the land. There is a proposition by Mr. Camfield's company being considered to rebond and issue $500,000 more bonds. That has not been voted. The financial condition of the Laramie-Poudre Reservoir and Irrigation Company is, they have not been able to do anything. Their clerks in their office have not been paid. Practically all of them have quit; some of them have filed claims in bankruptcy.

Since the cessation of work they have worked on three or four different plans to re-establish the district and re-finance the company. There has not any of them materialized into anything yet.

These lands as they now stand have value simply as grazing lands. They can be dry farmed. There is no method to get water upon them save and except by this proposed system which is uncompleted. The estimate of our engineer is that it will take $1,250,000 to install the system or a sufficient system to deliver water there so that these lands can be used profitably for irrigation. That would not pay these lien claims. The proposal about that in that construction is, the Laramie-Poudre bonds would have to be satisfied with Greeley-Poudre bonds. The holders would have to agree to exchange them. There is an agreement whereby they will do it, providing money before the contract can be carried out to complete the system; it is not yet in effect. That is a proposal of Camfield to have such an agreement. As to that claim of McIlwee on the tunnel of $100,000 or more, he has not yet agreed with Camfield to do that. His case

is now in court to establish his lien claim; to obtain judgment so he can foreclose.

There is about 78,000 acres held in freehold inside the district. The bond burden there now outstanding is a little over $30 an acre on the deeded acres. The people in the district are not since the work stopped paying the taxes to pay the interest on these bonds. They have passed resolutions that they would not pay until the work was resumed or assured of completion.

As the matter now stands and stood in 1912, I would say the value of lands in that district is from five to ten dollars an acre, exclusive of what improvements there is. I think they would be worth
446 more than that if the works should be finished. In 1912 the conditions I have described were as they are now. I have understood that the lands are taxed in 1912 at about an average rate of 33 1/3 per cent per acre.

Cross-examination.

By Mr. Dorsey:

The majority of the sales of land in the Greeley-Poudre irrigation district were made in 1909, 1910 and 1911. There has not been but very few since the cessation of work. There has been quite a few sales that occurred in 1911 and the two years preceding, but no considerable number considering that you were dealing with 125,000 acres of land.

There is about 78,000 acres of deeded land, but outside of that we have contracts signed into the district that are Government lands to the amount of about 47,000 acres more. The total acreage is approximately 125,000. The man who has filed upon these lands title to which is still in the United States agrees to come in and pay his tax, and when the water is furnished to pay the water assessment and interest on the bonds; become a part of the district.

I couldn't tell you the average rate per acre these lands sold at in 1909, 1910 and 1911; I would say the land sold in that district from $5 per acre up as high as $25 and $30. I would not say a majority of them were at prices in excess of $20 per acre. I sold during that time some five or six, and I believe the average of those would be less than $20 an acre. The average would be on the places I sold myself somewhere about $18 an acre. That perhaps would be a pretty fair average all the way through, or conservative average at that time.

There were perhaps a few sales of land in that district in 1912; not very many. I made two sales in 1912, in the latter part of January or first of February. They had both been homesteads and proved up; the improvements were not of great value. I would say there were not two better pieces of land in the district. The district embraces just as good a body of land as you could get in a body of that kind. I sold these two pieces to a gentleman by the name of George C. White; lives in Nebraska. The total purchase price for the north half of the northeast quarter of 34-9-66 was fifteen hundred dollars. I think it was assessed in 1912 at about three or four

dollars an acre. For the northeast quarter of section 7-8-65, the buyer gave about $3,800. That was assessed at about the same as all the other land. I presume there was some other sales of lands made in the district in 1912; but I have no personal knowledge of any.

447 I think eventually water will be furnished to irrigate the lands in that district. We are hoping it will be soon. No, it don't make any difference as to the value of the lands or the effect of the water on the lands whether Camfield's company or somebody else completes the works, but it does as to the value of the land and the amount of the burden we are having to pay; the longer it is delayed the more it is burdening us. A reasonably certain prospect of water did have some effect on the value of those lands. You can sell lands outside the district for more money today and more readily than inside; I know of some of them outside the district selling for six and eight and ten dollars an acre; dry farms, what they claim.

When I gave my value of the lands in the district at from five to ten dollars per acre in 1912, that is not according to my idea of the value of the lands for grazing purposes: that is about what you could sell it for. I have known of lands being offered at that price but no buyers. I have offered them at that price and had them listed with other agents for the past year. They are what I would say are the best lands in the district. That is exclusive of the bond burden, a man assumes that; in buying land he gives the seller so much money and steps into his shoes.

The illustrated pamphlet which was gotten out in the name of the Greeley-Poudre Irrigation District, on the outside of which is printed,

For the information of the investors in securities of and owners of lands in the Greeley-Poudre Irrigation District. The following report pertaining to the district and the progress of the work is respectfully submitted to the board of directors of The Greeley-Poudre Irrigation District,

was gotten up by the bonding house of Farson Sons & Company, and was endorsed by the board of directors. We just simply said that so far as we knew that. There was no regular action taken at the meeting of the board further than consenting. My name is printed on it as secretary of the district; purports to be issued under my sanction as well as that of the other gentlemen. Also the name of Charles F. Tew is printed on it as counsel for the district.

Q. Speaking of the values of the lands of this sort in Weld County, this circular says, does it not, "These conditions have brought water rights to a value of from $60 to $75 per acre, and the land with water to $200, and in many instances $500 per acre"?

448 A. It may say that. I don't know of any sales that were ever made at that price. I don't know what they did.

Q. I see. You thought it was true, did you not?

A. Perhaps some land that they might value as high as $500 an acre next to a town—small tracts, well improved, or something

of that kind; it is possible. I don't think there was ever any of it sold at such figures.

Q. On page 4 of this pamphlet it is stated, "An irrigated farm of 80 acres in the Greeley district will yield on the average, with rotated crops, as follows,"--then the details are given as to the rotated crops, and the conclusion is as follows: "This shows an average return from the land of $44.60 per acre, which manifests a land value of $446 per acre, as the same will yield interest of ten per cent on that amount." This is printed in the pamphlet that was given out under the name of your district, is it not?

A. It is got out not by the district.

Q. I don't care who got it out. Your name is signed to it.

A. It is printed.

I knew Farson was printing it. He got the information himself. We presumed that he got it. I believed it to be approximately true. I have no reason to disprove his figures. I never went into that to see whether they were correct or incorrect.

SAMUEL J. PEERY, witness on behalf of respondents.

Direct examination.

By Mr. Tew:

I reside in Greeley; have resided there about eight years; I think about twenty-eight years in Colorado. I have been engaged in the ranch or cattle business upon the range—livestock business twelve or fourteen years I think.

I have been engaged in farming ventures under the old ditches in the Cache la Poudre or Platte Valley. I have owned farms; bought and sold farms; traded in them.

I know most of the rights of the different ditches in the Platte Valley, especially on the east side of the river. I am acquainted with the character of land and the method of its tillage from Ft. Lupton down, and in a general way through the valley, more especially from Ft. Lupton on down to Evans. I have appraised some of the lands in that vicinity to determine their worth. I am interested in the abstract business at Greeley.

I am acquainted in a general way with the lands in the Greeley-Poudre irrigation district the Henrylyn and Denver-Greeley
449 Valley. Not familiar at all with each district, but know about it in a general way, as to whether it is range or irrigated land. It is a kind of cattle country; always has been a range country. Even though the ditches are partly built the condition of the country is about the same; some little settlements, but not very much.

I would say the market value of grazing land in Weld county is from one to two dollars per acre. I have run cattle myself quite awhile and I bought that kind of land. It may be a little more now; the range is a little scarcer and the cattle are higher than then.

I think I have a pretty fair idea of the average value of irrigated lands in Weld County; I would put it at about $50 an acre.

Cross-examination.

By Mr. Dorsey:

I have one piece of land in Weld county, right adjoining Evans, the southeast quarter of section 30, township 5, range 65, 160 acre tract. There are no buildings on it, only a fence. A few acres next to town are being farmed; it isn't much of a farm. I have no water right, but have an agreement with the town of Evans to get water out of the Evans ditch. It don't seem to have any special value because of its close location to Evans. I have had it about five years. I bought it five years ago. I think I paid $5,200 for it just the way it is, with this agreement with the city about using some water out of the town ditch.

I own some lots up here in Denver, and my principal business is trying to sell them for the last four or five years. I find property to be as unsalable in Denver as some people think it is in Weld County. I think this depression in our county is pretty general all over the country; things are not selling now as they were two or three years ago.

I have bought and sold irrigated lands in Weld county. That place at Evans is the last thing I bought, but I used to buy several, and sold them all but this one. I sold the last one, I expect it was five years ago. I got my ideas about the average value per acre of irrigated land in Weld county partly from my own experience in buying and selling these tracts several years ago and partly from general*ly* knowledge of conditions all around.

450 I think when they get the land over in Pleasant Valley up to $120 an acre they have got it high enough. For the best land in Weld County I think that is enough. I know land in Pleasant Valley has sold for very much more than that. It may have sold for $250 an acre; not much. I think Bruce Eaton paid $250 an acre for land in that location. I think he was probably raised in Weld County. His father was one of the very large property owners there and one of the pioneers of the county. It looks like Bruce Eaton ought to know the values of land in Weld County as well as anybody.

I think several paid as much as $200 an acre for land in Pleasant Valley; not such a great lot. My judgment differs from theirs as to the value of these lands.

I don't think there are plenty of other irrigation districts in Weld County where the land is just as good and valuable as in the Pleasant Valley country. I think land will bring more money in the Pleasant Valley on account of its being mighty nice laying land and right close to Greeley, and they have about the best water. I think in a number of places in the old irrigated sections they will raise as good crops as they will there, but the location is not as nice. There is considerable difference in value. Land will bring a good deal more in Pleasant Valley in two or three miles square than any other place; it will bring $50 more when you come to sell it than any other place in the county I believe. Assuming that the Pleasant

Valley lands are worth about $120 an acre, I included water in my estimate.

What the land will return in the basis upon which I have fixed my estimate of $50 an acre more than anything else; not entirely though.

An assessment of $720 on the southeast quarter of section 30, township 5, range 65, that I paid $5,200 for five years ago is enough. Three times that much is plenty for it. I don't know as I could sell it for that.

Affidavit of Daniel March, John C. Mosher, Al Hilton and Ray Robb introduced in evidence by respondents.

Thereupon the respondents rested their case.

451 (*Testimony for Complainant in Rebuttal.*)

T. C. HENRY, witness for complainant in rebuttal.

Direct examination.

By Mr. Dorsey:

My full name is Theodore C. Henry. I reside in Denver; have lived in Colorado thirty years.

I have had rather an extended experience in the matter of irrigation, water rights, the construction of irrigation works and dealing in irrigated lands in Colorado, based upon my operations in many of the valleys of the state during that period. I think I have a general knowledge of such matters in the state of Colorado. The nature of my operations has been the development of irrigation and the improvement of lands connected therewith. I think my experience is of such a character as to enable me to state the values of irrigated lands in Weld County, Colorado, in the year 1912. In connection with the irrigation development that I have initiated in several valleys of the state, I have carried on demonstrations in actual farming to the extent of many thousands of acres in the past, and have conducted more or less farming ever since up to the present time. In that way, and having personal experience, I think justifies me in my conclusion that I am pretty fairly well advised as to the productive value, and therefore the commercial value of irrigated land and irrigation rights.

I would say the average value of irrigated land in Weld county, Colorado, in the year 1912, in those districts where the works were completed for the delivery of water, excluding projected districts like the Henrylyn and Greeley-Poudre irrigation districts, and also excluding from consideration all seeped land, all land under the ditch which was too high to be irrigated, or for any other reason could not be irrigated—the value per acre of irrigated land itself, with water rights, was from one hundred to one hundred and fifty dollars per acre. The average value of the water rights was fifty to sixty dollars an acre. I will say that the net productive returns in 1912 on irrigated lands of the character described in location

would justify at least a commercial price that I have placed. I know of instances in the Greeley neighborhood which were quite beyond that, and if capitalized on the [bases] of six per cent justified from two hundred to two hundred and fifty dollars an acre as such price or value.

452 Cross-examination.

By Mr. Tew:

My main office has been in Denver a good many years. My branch office was not in Weld County within the past perhaps fifteen years. It was at Fort Morgan, it was Weld County then. I promoted some ditches down in Morgan County. In the promotion of those ditches it takes a goodly number of years to bring the lands from a condition of aridity to productivity. Since Fort Morgan was a part of Morgan County I haven't had an office in Weld County. I have had experience in farming lands in Weld County that I have mentioned; under the North Poudre; that was the first project; that is in Larimer County. It had been initiated about five years before I was connected with it. It hadn't lots of trouble when I was connected with it.

I had nothing to do with the building of the Bucker ditch, Farmers Independent, Brantner, Lupton Bottom, Consolidated Home Supply, The Handy; all built before I came there. Nothing to do with building the No. 2 Laramie-Weld, Larimer County, Lake Canal, New Mercer, Ogilvie. As a farmer I had nothing to do with farming in the potato belt in Weld County; I placed a number of farm loans. I do not know the acres that were planted in 1911 to potatoes, nor how many they yielded. I do not know what it costs to plant an acre of potatoes. I know approximately what it costs to irrigate them. Taking the potato belt under the No. 2 canal, I do not know how much of a water right you have to have under that canal to get a water supply. I know in a general way where the Pleasant Valley is. That is a potato country principally.

A farmer under the No. 2 canal has to pay maintenance on the canal and for lateral maintenance usually. Certainly, all this maintenance cost affects the cost of production. I have had occasion to go into the values of these irrigated acres in Weld County within the past thirty days in connection with the beet sugar industry. I can calculate only in a general way without knowing the several costs of maintenance and operation of the several ditches; still a person does not have to know the price of construction or the location of a system of any of those that you referred to in order to have an idea of the general value of a water right.

I have not been out in the country around Greeley for a couple of years, and then only just in the immediate neighborhood. I have no experiment station in Weld County. I am farming
453 in the Grand Valley. I am renting some land that I own in the Arkansas Valley. I am not really conducting an experiment station anywhere in the world. I have been doing that as an experiment for a number of years.

Redirect examination.

By Mr. Dorsey:

Within the past week I have been called upon to determine the value of a water right represented by stock in the Standley Lake project, with a view of utilizing such water rights in Weld County, and that led up to a discussion of values of land, both improved and unimproved. In connection with initiating the Henrylyn project I began an investigation of returns on agriculture in that section of Weld County, and of the Barr Lake, involving the value of water rights, and it was important to determine whether the [*the*] outlay would be justified by the net productive return, and that involved necessarily a considerable study of conditions locally. We are projecting and undertaking land irrigation and development in the lower Arkansas, and in order to get the information necessary and to convince my business clients, I must be able to make a showing as to the net productive returns to the farmers located in that same locality.

Because of location and general reputation the lands in the Greeley district are held proportionately at higher prices than the same quality in other parts of the state on the average.

JAMES U. HARRIS, witness on behalf of complainant.

Direct examination.

By Mr. Dorsey:

My home is in Grand Junction, but I reside temporarily in Denver. I am state land appraiser, appraising the value of land throughout the state; sent out by the state land board on applications to either lease or [*sale*]. I was county commissioner of the county I came from for seven years and had to pass on the value of lands there for assessment and equalization. Also been in that line in the state for about five years in passing on values.

In making appraisement of state lands in Weld County I have traveled in the territory for about four years, been all over the county. When I appraise lands for the state I take a circle and go to adjoining homesteaders or people who own land and get data on values of adjoining lands, then come to my own land and give the value. If it is an irrigated proposition I dig into the
454 priority of water, get to the value of the land and then state the particulars and present it to the board in a report. That has been the method I have pursued in Weld County during my appraisements there. I sometimes take up the crop proposition as a basis; not always.

I am fairly familiar with Weld County and with the values of land in it from the experience I have had. In the year 1912, the average value per acre of the irrigated lands in Weld County, excluding waste lands, seeped or otherwise, and lands that were non-irrigable although under ditch, and taking into consideration only those places where the irrigation works were complete so as to deliver the

water, with a fairly good priority I would give the average at $115. That includes the water.

I would say the average value per acre in 1910 of the land in the Henrylyn district was $25.00. I have appraised lands in that district in the last three years. I have gone through the Greeley-Poudre irrigation district; am familiar with the lands there; have appraised lands for the state in that district. I would say the average value per acre of the lands in the Greeley-Poudre district, under prospective irrigation, is $25.00; that is without any bond issue; over and above the bond issue.

I have had occasion to appraise in the last three years in Weld County the dry lands of the county which are above the irrigated belt of prospective irrigation. The average value per acre in 1912 of the dry lands in Weld County was about eleven dollars.

Cross-examination.

By Mr. Tew:

I know where is located section 36-8-63. I believe it is just within the Greeley-Poudre Irrigation District. I could not give you any definite idea as to whether I appraised that at forty dollars an acre unless I had my report. It is possible it was made by other people. I think Mr. Donovan, one of the appraisers and I went over it. I must have made the appraisement on prospective irrigation. In getting the appraisement of that I go to the people who are in the immediate locality and ask them what the conditions are and whether they soon hope to put it under ditch, and they tell me, and that is the way we get many appraisements, by the better people in that locality.

Section 36, Township 6, range 63 is under proposed ditch. I think it is out on the prairie six miles beyond Crow Creek.
455 It may be a dry land proposition. If thirty dollars an acre was my appraisement and report on it, I would stand behind it.

In the year 1910 and 1911, I think, possibly 1909 and 1910, there was a great many dry lands sold in Weld County at an average price. There was during that time a sort of boom or high prices, and that fell out, and by the end of 1911 there was practically no sales; financial conditions brought that on. It was not any more pronounced in the Greeley country than other parts of the state. Conditions as to sales were very depressing in 1912. There wasn't any market. At the present time we have got a number of applications for lands in your county, and not far out.

Redirect examination.

By Mr. Dorsey:

My affidavit on file in this case states as to section 36, township 8, range 63, and section 36, township 6, range 63, which Mr. Tew asked me specifically about, that they were appraised by other appraisers.

I do not consider that the value of state lands in Weld County in 1912 was any less than it was in 1911 or 1910.

A. W. SCRIBNER, recalled.

Direct examination.

By Mr. Dorsey:

I have made investigation to determine the assessed valuation of the property of The Great Western Sugar Company in Weld County in 1912. As to the character and value of the physical property on the Great Western Sugar Company in Weld County, I have a report of the statements of Mr. Morey, President of that Company, before the Congressional investigating committee at Washington, in June, 1911.

The assessment made by the county assessor in the year 1912 on the property of the Great Western Sugar Company in Weld County was: At Eaton, real estate $3,990, improvements $101,750, personal property $85,400, total $191,140; At Greeley, real estate $4,710, improvements $102,000, personal property $85,660, total $192,730; at New Windsor, real estate $24,570, improvements $104,900, personal $86,040, total $215,510. These three sugar plants are in Weld County.

Mr. Morey testified, according to this record, that $1,500 per slicing ton would be a low cost of reproduction or erection of these sugar [factory-]. Each factory is shown in their circulars
456 as being 600 tons capacity; that would make the total for the factories themselves $900,000 each. The tax schedule shows that the improvements valuation also includes the beet dumps; taking the beet dump valuation out of these several improvements would leave approximately $100,000 each assessment, which would be one-ninth of $900,000. In making my computation I have excluded real estate. I have made no computations of per cent in respect to those assessments.

The report of the Interstate Commerce Commission shows in Dec., 1911, operative mileage of the Union Pacific Railroad Company proper, 3,537.13, Oregon Short Line 1,761.99, Oregon Washington Railroad and Navigation Company 1,919.56, making a total of 7,218.68 miles. The bulletins of the Interstate Commerce Commission for the months of July to December, 1911 shows the average operated mileage of the Union Pacific System for that period of six months, 7,072.81 miles. I never heard of the term active mileage in respect to a railroad; it is designated as operated mileage. Operated mileage I suppose means that the lines are in operation.

The quotations on Union Pacific securities vary greatly from time to time. I took the quotations on Union Pacific securities for this morning on the New York market from the report as published in the Daily News of this morning. Union Pacific common stock, closing bid 150½; Union Pacific preferred, closing bid 81⅛. The bonds are quoted to-day, Union Pacific fours 97, Union Pacific convertible fours 92, Union Pacific first and refunding fours 93, Oregon Short Line refunding fours 89⅝; other issues of Oregon Short line and O. R. & N. bonds are not quoted this morning.

Cross-examination.

By Mr. Tew:

6,678.29 miles was stated in my schedule filed with the Tax Commission as to average operated mileage for the fiscal year ending June 30, 1911. I stated elsewhere in the same schedule that on December 31, 1912 the main track mileage was 7,084.52 miles. The report I read from was a bulletin of the Interstate Commerce Commission prepared by the Division of Statistics for the month of December, 1911. They say the operated miles in December 1911 was 7,218.68.

The books from which I took the data regarding Mr. Morey's testimony in the hearings held by the special committee on the investigation of the American Sugar Refining Company and others by the House of Representatives are purported to be published in three volumes. This is volume 1, published at the Washington Government Printing Office, 1911, page 908. There are no other
457 pages from my excerpt in the testimony. I understand that testimony was given by Mr. C. S. Morey, president of the Great Western. I didn't look to find his initials here.

In that part of complainant's Exhibit A designated Schedule 16, the item of taxes paid in 1911 of $1,952,522.99, including Federal income tax, is not included in the item of operating expenses.

GEORGE G. HOLCOMB, recalled.

Direct examination.

By Mr. Dorsey:

I heard the testimony of Mr. Scribner just now regarding the assessed valuations of the property of The Great Western Sugar Company in Weld County. There was an unusually large assessment on lands at the Windsor plant. At the Windsor plant the Great Western Sugar Company has a farm right near the sugar factory. The total assessment of lands and improvements on that farm for 1912 is $20,560.

I have made plats of Weld County of each township, showing assessed valuations as they appear upon the assessor's books.

The west half of the southeast quarter of section 30, township 4, range 66, with respect to which the witness Wylie testified, which at one time belonged to him, that it was worth sixty or seventy dollars an acre, was assessed in 1910, 80 acres at $12, improvements $300, total assessment $1,260; 1912, 80 acres at $15, improvements $250, total assessment $1,450.

His brother's land in section 28, township 4, range 66, which the witness Wylie said was worth $60 an acre, was assessed in 1910, 93 acres at $15, $1,395, improvements $200, total assessment $1,595; 1912, 100 acres at $12, $1,200, three acres at three, nine dollars, improvements $200, total $1,409.

The eighty acres in the north part of section 1, township 1, range 67, which the witness Decker said he paid $67.50 for, making a total

cost of $6,400, was assessed in 1910, 40 acres at twenty dollars, $800, forty acres at three dollars, $120, total $920; in 1912, thirty acres at twenty dollars, $600, forty-four acres at three dollars $132, improvements $250, total assessment $982.

458 The southwest quarter of the northwest quarter of section 6, township 1, range 66, which the same witness Decker said he paid thirty dollars an acre for nine years ago, a total purchase price of $1,200, was assessed in 1910, 40 acres at $3.00, $120; 1912, 40 acres at $3, $120.

The southwest quarter of section 18, township 5, range 65, which Mr. Levis, the county commissioner, stated that he owns and lives on, and the fifty acres he owns in the northwest quarter of section 18, township 5, range 65, on which he stated the improvements were worth four thousand dollars and the land and improvements $18,900 in 1912, was assessed in 1910, 140 acres at twenty dollars, $2,800, seventy acres at three, $210, improvements $600, total $3,610, and in 1912 the same as in 1910.

The west half of the northeast, the east half of the northwest, the east half of the southwest and the southeast of section 14, township 3, range 67, which Mr. Hodgson, another county commissioner, testified he owns and lives on and was worth with improvements $26,000 and of which in 1912 he irrigated 150 acres, was assessed in 1910, 95 acres at $15, $1,425, 65 acres at $5, $325, 234 acres at $3, $702, improvements $600, total $3,052; in 1912, 120 acres at $15, $1,800, 160 acres at five, $800, 110 acres at $3, $330 improvements $600, total $3,530.

The southeast quarter and west half of the northeast quarter of section 10, township 3, range 67, 240 acres, which Mr. Hodgson also testified he sold at the rate of $52 an acre, and on which he realized $12,080 in cash, was assessed in 1910, 200 acres at ten dollars, $2,000, forty acres at three dollars, $120, improvements $100, total $2,220. Same in 1912.

The east half of the northeast quarter of section 10, township 3, range 67, which Mr. Hodgson also testified he sold for $3,200, was assessed in 1910 at $900; in 1912 the same.

The north half of the northeast quarter of section 34, township 9, range 66, in the Greeley-Poudre Irrigation District, which Mr. Eastlack, a witness for defendants, testified a buyer paid in 1912 $1,500 for, was not assessed in 1910; it was assessed in 1912, 80 acres at two dollars $160, improvements $50, total $210.

The northeast quarter of section 6, township 8, range 65, also in the Greeley-Poudre Irrigation District, which he also testified the buyer in the same year paid $3,800 for, was not assessed in 1910; in 1912 it was assessed, 60 acres at $10 $600, 100 acres at three dollars $300, improvements $50, total $950.

459 The east half of the southeast quarter of section 33, township 7, range 65, which Mr. Campbell testified was worth ten thousand dollars, was assessed in 1910, 80 acres at $25 $2,000, improvements $450, total $2,450; in 1912, 75 acres at twenty-five dollars $1,875, five acres at three dollars $15, improvements $400, total $2,290.

The southeast quarter of section 15, township 7, range 65, which Mr. Campbell testified was worth, improvements $700, lands $14,300, total $15,000, was assessed in 1910, 144 acres at twenty dollars $2,880, improvements $200, total $3,080; in 1912 the same.

The ten acres which Mr. Ireland testified he sold in 1913 out of a sixty acre tract he owned in the northwest quarter of the southwest quarter and the north half of the southwest quarter of the southwest quarter of section 2, township 1, range 65, for the sum of $1,000, was assessed in 1910, ten acres at one and a half, $15; in 1912, ten acres at two dollars, $20.

The east half of the northwest quarter of section 32, township 8, range 62, which Mr. Bliss said that he and Mrs. Tew bought in 1909 at $20 an acre and sold in 1910 at $22 an acre, the purchase price therefor being $1,600 and the selling price $1,760, which lies in the Greeley-Poudre Irrigation District, was assessed in 1910, 80 acres at $2, $160. In 1912, 80 acres at $2 $160.

The northeast quarter of section 4, township 5, range 65, two-sevenths of which Mr. Bliss testified he sold to his brother at a rate which made the sale price of the tract $10,500, was assessed in 1910, 50 acres at $40, $2,160, 26 acres at $5, $130, total $2,290; in 1912, 54 acres at forty dollars, $2,160, 26 acres at five dollars, $130, improvements $100, total $2,390.

990 Folios.

Lodged in clerk's office, December 6th, 1913.

(*Certificate of District Judge to Narrative Statement of Evidence.*)

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Robert E. Lewis, Judge of the district court of the United States for the district of Colorado, do hereby certify that on the various dates specified in the record the above entitled cause came on for hearing and was heard before me as Judge of said court upon
460 the application of the plaintiff for a preliminary injunction, and that upon said hearing and in support of and in opposition to said application certain oral evidence was offered, in addition to written affidavits and exhibits.

In accordance with paragraph (*b*) of Equity Rule No. 75, I do hereby approve the attached statement of said oral evidence and do further certify that said statement and plaintiff's exhibits A, B, C, D, E, F, and G, and defendants' exhibit consisting of certain extracts from a newspaper called "The Keota News," which were offered in connection with said oral evidence, and the following affidavits, with the exhibits thereto attached, to-wit:

On behalf of plaintiff, in which affiants are:

H. C. Fairall (affidavits);

A. W. Scribner (2 affidavits);

Arthur H. Scribner;

Frank A. Ayer;
J. U. Harris;
G. R. Gaylor;
Harry T. Proctor;
F. A. Hensley;
George G. Holcomb;
On behalf of defendants, in which affiants are:
Ray Robb;
Dan March;
John C. Mosher;
Al Hilton;

and stipulation of the parties respecting the report of the Census of 1910, all of which are included in the transcript of the record herewith certified, fully and fairly present all of the evidence offered by either party in support of or in opposition to said application for a preliminary injunction, from the denial of which an appeal has been taken by the plaintiff to the circuit court of appeals.

Dated this 12 day of December, 1913.

ROB'T E. LEWIS,
District Judge.

Endorsed: Statement of the Evidence Lodged with the Clerk by Plaintiff and Appellant, in Accordance with Paragraph B., of Equity Rule 75. Filed Dec. 12, 1913, Charles W. Bishop, Clerk.

461 (*Order, Dec.* 30, 1913, *Enlarging Return Day of Citation.*)

Before Judge Lewis.

At this day, for good cause shown, it is ordered that the return day of the citation on appeal to the United States Circuit Court of Appeals for the eighth circuit be, and the same is hereby, enlarged and extended for sixty (60) days.

(*Præcipe for Transcript.*)

In accordance with paragraph (*a*) of Equity Rule No. 75, plaintiff above named being the appellant on the appeal to the Circuit Court of Appeals from the order denying its application for preliminary injunction, files this its præcipe indicating the portions of the record to be incorporated into the transcript on such appeal, to-wit:

1. Bill of complaint.
2. Subpœna and return of service thereon.
3. Notice of application for preliminary injunction, and return of service thereon.
4. Answer.
5. Petition for subpœna duces tecum to A. L. Mumper, Assessor of Weld County, and order denying the same.

6. Supplemental bill of complaint.
7. All affidavits filed on behalf of plaintiff in support of application for preliminary injunction, including all exhibits attached thereto or referred to therein.
8. All affidavits filed on behalf of defendants in opposition to said application, including all exhibits attached thereto or referred to therein.
9. All orders relating to hearing on application for preliminary injunction.
10. The statement in narrative form of the evidence, other than written affidavits, taken on behalf of either party, at the hearing upon said application for preliminary injunction when such statement has been put in final form and approved by the court or judge, as provided in paragraph (*b*) of said Equity Rule No. 75, together with all exhibits offered by either party at the time of such hearing, other than those attached to witten affidavits.
11. Order denying application for preliminary injunction.
12. Opinion of Judge Lewis upon denial of said application.
13. Assignment of errors, petition for appeal, order allowing appeal, bond on appeal and citation with return of service
462 thereon, on appeal to the circuit court of appeals, from order denying preliminary injunction.
14. Petition for restraining order, order granting same and fixing bond, bond on restraining order and restraining order (with return of service thereon) to remain in effect pending appeal.
15. This præcipe, with notice of filing same and of lodging in the Clerk's office of the narrative statement of evidence mentioned in paragraph 10 above, together with subsequent orders in respect thereto, if any.
16. Certificate, etc.

N. H. LOOMIS,
CLAYTON C. DORSEY,
E. I. THAYER,
Solicitors for Plaintiff and Appellant.

GERALD HUGHES, *Of Counsel.*

Endorsed: Filed in the District Court on Dec. 6, 1913.

(*Stipulation as to Transcript on Appeal.*)

It is hereby stipulated by and between the parties hereto, by their respective solicitors, that the statement of the evidence taken upon the application for a preliminary injunction herein, which statement was heretofore lodged with the clerk by the plaintiff and appellant, in accordance with paragraph (*b*) of Equity Rule No. 75, fully and fairly states the evidence offered by either party in connection with said application for preliminary injunction other than the written affidavits offered in said connection and certain written exhibits offered in connection with said testimony.

It is further stipulated that the matters and things specified in the præcipe heretofore filed herein by the plaintiff above named (appellant in the circuit court of appeals), including said statement of the evidence hereinabove mentioned, plaintiff's exhibits A, B, C, D, E, F, and G, and defendants' exhibit consisting of certain extracts from a newspaper called "The Keota News," and the following mentioned affidavits, with the exhibits thereto attached, to-wit:

On behalf of plaintiff, in which affiants are:
H. C. Fairall (2 affidavits);
A. W. Scribner (2 affidavits);
Arthur H. Scribner;
Frank A. Ayer;
J. U. Harris;
G. R. Gaylor;
Harry T. Proctor;
F. A. Hensley;
George G. Holcomb.

463 On behalf of defendants, in which affiants are:
Ray Robb,
Dan March,
John C. Mosher,
Al Hilton,

will constitute the complete record upon which the application of plaintiff (and appellant) for a preliminary injunction was heard and determined.

It is further stipulated that defendants' exhibit 1, consisting of certain extracts from the Thirteenth Annual Report of Union Pacific Railroad Company need not be separately transcribed for the reason that it has already been fully transcribed in the statement of the evidence hereinabove mentioned; also that defendants' exhibit 2, consisting of certain extracts from the bulletin relating to agriculture in Colorado, of the Thirteenth Census of the United States, need not be transcribed because of the stipulation of the parties relating to said Census Report which is a part of the record herein.

N. H. LOOMIS,
C. C. DORSEY,
E. I. THAYER,
Solicitors for Plaintiff.

GERALD HUGHES,
Of Counsel.

W. E. BLISS,
CHARLES F. TEW,
Solicitors for Defendant.

Endorsed: Filed in the District Court on Dec. 12, 1913.

Citation on Appeal from Order Denying Injunction.

UNITED STATES OF AMERICA,
Eighth Judicial Circuit:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

United States of America to the Board of County Commissioners of the County of Weld, State of Colorado; W. R. Patterson, as County Treasurer of said County, and S. J. McAfee, as Sheriff of said County, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, Missouri, sixty (60) days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the clerk's office of the United States district court for the district of Colorado, wherein Union Pacific Railroad Company is appellant and you are appellees, to show cause, if any there be, why
464 the interlocutory decree or order rendered against the said appellant, denying its application for a preliminary or temporary injunction, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Robert E. Lewis, Judge of the District Court of the United States, this 10th day of November, A. D. 1913.

ROBT. E. LEWIS,
Judge of the United States District Court for the District of Colorado.

The undersigned, solicitors for all of the appellees named in the foregoing citation, hereby acknowledge service of said citation upon said appellees and each of them, at Denver, Colorado, this 11th day of November, A. D. 1913.

CHARLES F. TEW,
WALTER E. BLISS,
Solicitors for All of the Appellees Named in said Citation.

Filed in the District Court on November 13, 1913.

(Clerk's Certificate to Transcript.)

UNITED STATES OF AMERICA,
District of Colorado, ss:

I, Charles W. Bishop, clerk of the district court of the United States for the district of Colorado, do hereby certify the above and foregoing pages, bound in two (2) volumes, and numbered from one (1) to three hundred and eighty-four (384), and from three hundred

and eighty-five (385) to seven hundred and fifty-nine (759), all numbers inclusive, to be a true, perfect, and complete transcript and copy of the pleadings, and other matters set forth in the præcipe filed herein, together with a true copy of such præcipe, heretofore filed or entered of record in said court and in a certain cause in said court pending, wherein the Union Pacific Railroad Company is plaintiff and The Board of County Commissioners of the County of Weld, state of Colorado, W. R. Patterson as County Treasurer of said county and S. J. McAfee as Sheriff of said county are defendants, as fully and completely as the same still remain on file and of record in my office at Denver.

In Testimony to the above, I do hereunto sign my name and affix the seal of said court, at the City and County of Denver, in said district, this tenth day of January, A. D. 1914.

[Seal U. S. Dist. Court, Dist. of Colorado.]

CHARLES W. BISHOP, *Clerk.*

Filed Jan. 17, 1914. John D. Jordan, Clerk.

465 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(*Appearance of Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 4136.

UNION PACIFIC RAILROAD COMPANY, Appellant,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO, et al.

The Clerk will enter *my* appearance as Counsel for the Appellant.

N. H. LOOMIS,
Omaha, Nebr.
C. C. DORSEY,
Denver, Colo.

GERALD HUGHES,
Denver, Colo., of Counsel.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Jan. 23, 1914.

(*Appearance of Counsel for Appellees.*)

The Clerk will enter *my* appearance as Counsel for the Appellees.

CHARLES F. TEW,
WALTER E. BLISS,
Greeley, Colorado.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 23, 1914.

(Order of Submission.)

May Term, 1914.

WEDNESDAY, May 6, 1914.

This cause having been called for hearing in its regular order, argument was commenced by Mr. C. C. Dorsey for appellant, continued by Mr. Charles F. Tew for appellees and concluded by Mr. C. C. Dorsey for appellant.

466 Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

467 *(Opinion.)*

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1914.

No. 4136.

UNION PACIFIC RAILROAD COMPANY, Appellant,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO, et al., Appellees.

Appeal from the District Court of the United States for the District of Colorado.

Mr. C. C. Dorsey (Mr. N. H. Loomis, Mr. Gerald Hughes and Mr. E. I. Thayer, on the brief), for Appellant.
Mr. Charles F. Tew (Mr. Walter E. Bliss, on the brief), for Appellees.

Before Hook and Smith, Circuit Judges, and Amidon, District Judge.

AMIDON, District Judge, delivered the opinion of the Court.

This is a suit by the Union Pacific Railroad Company against the Commissioners of Weld County, Colorado, and its tax-collecting officers, to restrain the collection of state, county and municipal taxes levied for the year 1912. The complaint charges, in substance, that the property of the Railroad Company was assessed at one-third of its actual value, while all other property was assessed at not to exceed one-fifth of its value. It is also charged that some classes of property which should properly have been assessed for purposes of taxation, were wholly omitted by the assessors. These discriminations are alleged to have been systematic and deliberate. Application
468 was made to the trial court for a temporary injunction. This was heard upon bill, answer and affidavits, and a large volume of oral testimony, and was denied. The present appeal is brought to

review that order. The trial court based its decision upon Section 5750 of the Revised Statutes of Colorado, which reads as follows: "In all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

Following the decision of the Supreme Court in Singer Sewing Machine Company v. Benedict, 229 U. S., 481, the trial court held that this statute affords a complete and exclusive remedy for the wrongs here complained of. The appeal raises two questions: (1) Has the statute been repealed as to the tax levy of 1912? (2) If the statute applies to the taxes of 1912, does it afford an adequate remedy?

Plaintiff claims that Section 5750 above quoted was repealed by Section 5 of Chapter 134 of the Session Laws of 1913, which reads as follows:

"No abatement, rebate or refund of taxes shall be allowed by the county commissioners unless a hearing shall be had thereon, and a notice of such hearing and an opportunity to be present being first given to the assessor; and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado Tax Commission their findings, giving the amount of such abatement, rebate or refund, and their reasons therefor; and such abatement, rebate or refund, shall became effective upon the endorsement thereon of the approvel of the Colorado Tax Commission; and in case the said Colorado Tax Commission shall disapprove the recommendations of the county commissioners, they shall endorse their disapproval thereon, and return it to the county commissioners with a statement of their reasons therefor, and no abatement, rebate or refund of taxes shall be allowed by the said board of county commissioners if the application is disapproved by the said Colorado Tax Commission."

In our judgment this statute has nothing to do with the subject embraced in Section 5750. It is confined wholly to the admin-
469 istrative functions of county commissioners. By numerous statutes of Colorado, those bodies are vested with power to revise tax proceedings, and, if assessments or taxes are found to be illegal, to abate or refund the same. See Sections 5691 and 5641 of the Revised Statutes; Section 13, Sub-Division- 1, 5 and 7, and Section 14 of Chapter 212 of the Session Laws of 1911. It is also probable that county commissioners, by virtue of their general control over the fiscal affairs of counties, would be vested with power to abate or refund taxes found by them to be illegal. There are numerous provisions in the statutes of the state which give color to such an authority. Section 5 of Chapter 134 of the Laws of 1913, above quoted, is intended to place this power of county commissioners under the supervision of the Colorado Tax Commission. It simply forbids county commissioners to abate or refund taxes as the result of their own investigation and judgment without the consent of the state commission. It is not intended to take away their duty to pay any judg-

ment recovered in court against the county under Section 5750. The right created by that section is not dependent upon any action of county commissioners or other taxing agencies. It is quite plain that such bodies, exercising their administrative power to relieve against erroneous or illegal taxes, would, if they found any tax to be erroneous or illegal, grant relief themselves, and in such a case there would be no occasion to resort to the courts under Section 5750. The phrase in that section, "shall thereafter be found to be erroneous or illegal," relates to a finding by a court in a judicial proceeding, and not to the action of administrative boards. To be sure, a taxpayer feeling aggrieved by the assessment of his property, or the levying of a tax, would be bound to seek redress by application to administrative boards clothed with power to grant him relief, before resorting to the courts; but the door to the court is not confined to an appeal from such administrative bodies. Any taxpayer aggrieved by taxing authorities, having exhausted the steps pointed out by statute to obtain relief from such bodies, may then pay the illegal exaction, and institute an independent action under Section 5750 to recover any payment which he claims to be erroneous or illegal within the provisions of that section. It seems to us plain, therefore, that Section 5 above quoted was not intended as a repeal of Section 5750.

But if such had been its purpose it would not affect the tax
470 levy for 1912. By Section 5666 of the Revised Statutes of Colorado, the tax list and warrant for its collection must be delivered to the county treasurer not later than January first following the year for which the tax is levied. By Section 5675 no demand by the treasurer is necessary, but it is made the duty of every person against whom a tax is levied to pay one-half of the same on or before the last day of February, and the remaining half on or before the last day of July of the year following the one in which the tax is levied. Under these statutes the tax for 1912 was complete on the first day of January, 1913. The rights and duties of the public and of taxpayers were fixed at that time. This being the case the remedies which the law then afforded ought to follow the tax until it is collected. The statute of which Section 5 above quoted is a part was not approved until May 1, 1913, five months after the tax of 1912 became complete. It should be given a prospective operation only. That is the cardinal rule or construction which cannot be departed from except in obedience to the express language of the statute. Union Pacific R. R. Co. v. Laramie Stock Co., 231 U. S., 190. The statute here involved contains no language of that import. As a rule, statutes relating to taxation are thus construed. Lewis' Sutherland on Statutory Construction, Sec. 645; Matter of Miller, 110 N. Y., 216; American Investment Co. v. Thayer, 7 S. D., 72; Hall v. Perry, 72 Mich., 202, 40 N. W., 324. Statutes in force at the time a tax is levied continue in force for its collection notwithstanding their amendment or repeal. City of Indianapolis v. Morris, 58 N. E., 510; Leonard v. Indianapolis, 36 N. E., 725; Oakland v. Whipple, 44 Cali., 303; Smith v. Kelly, 24 Ore., 464, 33 Pac., 642; Smith v. Humphrey, 20 Mich., 398; Blakemore v. Cooper, 15 N. D., 5, 106 N. W., 566; Cooley on Taxation, p. 499 (3d Ed.). Section

6298 of the Colorado Statutes supports this view. It provides that the repeal, revision or amendment of any statute shall not have the effect to release, extinguish or modify, in whole or in part, any penalty, forfeiture or liability, civil or criminal, which shall have been incurred under such statute. The liability of the county to refund any tax found to be illegal was a part of the levy of 1912. It was a right which the taxpayer had with respect to the tax, as well as a liability of the county, and was not taken away or impaired by the subsequent revision contained in the act of 1913. In our judgment, therefore, the remedy granted by Section 5750 was open to the plaintiff.

471 Is the remedy given by Section 5750 adequate? It is difficult to follow the reasoning which would hold that it is not adequate. The evil caused by suits in equity to restrain the collection of taxes is grave, and has often been set forth by courts. Dows v. Chicago, 11 Wall., 108, 112; State Railroad Tax Cases, 92 U. S., 575; Indiana Manufacturing Co. v. Koehne, 188 U. S., 681; Boise Artesian Water Co. v. Boise City, 213 U. S., 276. To correct this evil, statutes of similar import to Section 5750 have been passed in many of the states of the Union. The highest court of Colorado has frequently declared the correction of this evil to have been the object of its statute. Board of Commissioners of Bent Co. v. Atchison, T. & S. F. Ry. Co., 125 Pac., 528. The statute is not attacked upon the ground that it is unconstitutional, nor could such an attack, if made, be sustained. The law is, therefore, valid legislation. It was not intended to be cumulative. Its object was to give an action at law for the recovery of sums paid on account of invalid taxes in place of a suit in equity to restrain their collection. Under such circumstances does it lie with the courts to say that the remedy which the legislature has provided is inadequate, and that the remedy which it has condemned shall, therefore, be continued? This would be to make the law of no effect through the traditions of equity. It would not only be judicial legislation, but would nullify a statute which is conceded to be constitutional. It is a mistake to view this statute as relating to procedure only. It creates a right in favor of the aggrieved taxpayer, and, from considerations of the highest public policy, abolishes the right to stay the collection of public revenues by injunction. The courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the one which it takes away. The statute being constitutional, the judgment of the legislature on that subject must control. Such statutes have been frequently before the Supreme Court, and have been uniformly held to afford a plain, speedy and adequate remedy such as excludes the right to resort to equity. Tennessee v. Sneed, 96 U. S., 69; Shelton v. Platt, 139 U. S., 597; Allen v. Pullman Co., 139 U. S., 658; Indiana Manufacturing Co. v. Koehne, 188 U. S., 681; Singer Sewing Mach. Co. v. Benedict, 229 U. S., 481. Counsel for plaintiff insists that Raymond v. Traction Co., 207 U. S., 20, is an exception. We do not so regard it. The opinion is expressly based on the ground that there was no statute in Illinois authorizing a

single action for the recovery of money paid in discharge of
472 an illegal tax; that the only remedy was the common law remedy to pay under protest, to enforce which a multiplicity of actions was necessary. (Pages 39 and 40.)

Counsel urges as an "equitable circumstance" that the tax will cast a cloud upon the title to the company's real property. The remedy which the statute prescribes, however, will dissipate any such cloud. Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief, are not applicable when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted.

Counsel also urges that the taxing officers were guilty of fraud in the assessment of plaintiff's property, and that fraud is a ground of equitable jurisdiction. But it is by no means true that wherever fraud exists equity may be resorted to for redress. That is not the case when a legal remedy has been substituted by statute for the remedy in equity. We are not concerned with the cause of the invalidity of the tax. It may be due to illegality, unconstitutionality or fraud. Whatever the cause it can do no more than make the tax invalid, and that alone is not a ground of equitable jurisdiction. In rare cases it may happen that the fraud of taxing officers will create a condition which statutes like Section 5750 will not enable courts to redress. Cummings v. National Bank, 101 U. S., 153, is mentioned in Bent County v. Santa Fe R. R. Co., 52 Colo., 609, 125 Pac., 528, as an example of this kind, though in the State of Ohio, where that case arose, there was an express statute authorizing a resort to equity; and the Supreme Court of the United States has since held that Cummings v. National Bank rests upon that statute. Shelton v. Platt, 139 U. S., 591, 599. The inability of courts to assess property for purposes of taxation may also cause the remedy at law to be inadequate. Auditor General v. Pioneer Iron Co., 123 Mich., 521. In our judgment the present case contains no exceptional features of the kind to which we have adverted.

Again we are told that the remedy given by the statute will lead to multiplicity of suits. The county treasurer is, under the statutes of Colorado, the collector of all taxes, state, county, school and municipal. In the accounting system which the law provides, he
473 is required to pay over the taxes to the state, city, school and town authorities as the same are collected. It is, therefore, urged that if the plaintiff should pay the taxes here complained of, they would be promptly distributed to the several public treasuries on whose behalf they were levied, and that plaintiff would be compelled to resort to a separate suit against each of these in order to recover the money paid. These difficulties are all of counsel's own creating. They do not exist in the statute. Its language is plain and comprehensive. It provides that "in all cases where any person shall pay any tax, interests or costs, or any portion thereof, that shall be found to be erroneous or illegal * * * the board of county commissioners shall refund the same, without abatement or discount, to the taxpayer." As to state taxes, there is an

express provision giving to the county credit in its accounting with the state for any taxes that have been refunded. We have no doubt that the same remedy would apply as to municipalities and that the county treasurer could take credit in his settlements made from time to time with them for their proportion of any sum which the county was compelled to pay as a refund. Be this as it may, the language of the statute is plain. It has existed for more than forty years. It has been repeatedly held by the highest court of the state to afford the taxpayer a plain, speedy and adequate remedy. We cannot, from speculative reasoning as to difficulties of accounting, hold that the aggrieved taxpayer will not receive, in a single suit against the county, the full compensation which the law provides. All these dangers as to multiplicity of suits were present in the case of Singer Sewing Machine Company v. Benedict, 229 U. S., 481, and in Indiana Manufacturing Co. v. Koehne, 188 U. S., 681, and still the remedy provided by the statute was held to be plain, adequate and complete so as to exclude a resort to equity.

Finally it is urged that the evidence has been taken and shows the taxes to be illegal and plaintiff is, therefore, entitled to keep its money; that to compel it to pay the taxes and then bring an action to recover its money under the statute, would not be as complete and speedy a remedy as a decree and injunction in this suit. Hence the plaintiff is entitled to relief in equity. But if this reasoning is sound, the wrongful resort to equity becomes the very ground of equitable jurisdiction. It is true that an injunction could be issued in this case in a shorter time than would be necessary to pay the taxes and begin an action at law and prosecute it to judgment
474 for the recovery of the money. That, however, is not the test.

To determine whether the remedy at law is as speedy and adequate as that in equity, the court must place itself at the beginning before any litigation has been started. If the position of counsel were sound, every decision of the Supreme Court reversing a decree in equity because the remedy at law was adequate, would be wrong. Decisions of this kind are numerous, many of them occurring in suits to restrain the collection of taxes. As the Supreme Court has often said, Section 723 of the Revised Statutes "means something." Buzard v. Houston, 119 U. S., 347, 351. It at least emphasizes the rule which it declares. It can be given effect in no other way than by dismissing suits brought in violation of its provisions. We decline, therefore, to express any opinion touching the validity of the taxes. That issue must be determined in an action under the statute.

The decree of the trial court is Affirmed.

Filed October 12, 1914.

475 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1914.

MONDAY, October 12, 1914.

No. 4136.

UNION PACIFIC RAILROAD COMPANY, Appellant,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, State of Colorado; W. R. Patterson, as County Treasurer of said County, and S. J. McAfee, as Sheriff of said County.

Appeal from the District Court of the United States for the District of Colorado.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Board of County Commissioners of the County of Weld, State of Colorado; W. R. Patterson, as County Treasurer of said County, and S. J. McAfee, as Sheriff of said County, have and recover against the Union Pacific Railroad Company the sum of twenty dollars for their costs herein and have execution therefor.

October 12, 1914.

476 United States Circuit Court of Appeals, Eighth Circuit.

No. 4136.

UNION PACIFIC RAILROAD COMPANY, Appellant,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO, et al., Appellees.

Appeal from the District Court of the United States for the District of Colorado.

Petition for Rehearing.

Now comes the appellant above named, and respectfully petitions the court to recall and set aside the opinion heretofore filed herein and the order, if any, entered thereon, and to grant a rehearing of said cause; and for grounds of such petition respectfully urges that

this honorable court has inadvertently committed error, to the manifest and great prejudice of petitioner, and in the following respects, to-wit:

1. In holding that the federal court of equity was without jurisdiction of this cause.

2. In holding that the Colorado statute could or did contract, control, condition, or in any manner limit the equity jurisdiction of the federal court.

3. In holding that a remedy at law, given by a state statute, however plain, certain, speedy, adequate, and complete, could or did oust, limit, or at all affect equity jurisdiction of the federal court.

4. In renouncing equity jurisdiction, when it was invoked upon several well-sustained grounds, such as were recognized, en-
477 forced, and acted upon by the High Court of Chancery in England in 1789, and therefore made a permanent part of federal equity jurisprudence and jurisdiction by the Constitution and statutes of the United States.

5. In assigning to a state statute a potency and effect which it could not possibly possess, no matter what its provisions.

6. In holding that the statutory remedy, if any, is exclusive.

7. In holding that the state statute precludes an inquiry as to the certainty, scope, and adequacy of the remedy afforded thereby.

8. In holding that the equity jurisdiction of the federal courts is destroyed by the state statute, however great may be the doubt as to the availability, scope, or efficacy of the statutory remedy.

9. In holding that the statute of the State of Colorado afforded a remedy for all or any of the grievances here complained of.

10. In holding that the taxes, if paid, could be recovered in an action at law.

11. In holding that the city, town, and school district taxes, if paid, could be recovered in an action at law.

12. In holding that all of said taxes, if paid, could be recovered in one action at law.

13. In holding that all of said taxes, if paid, could be recovered by any course of procedure, or in any form of action at law, under any circumstances whatever.

14. In misconstruing and misapplying the statutes of the State of Colorado.

15. In misconstruing and misapplying the decisions of the Supreme Court of the State of Colorado.

16. In misconstruing, misapplying, and departing from settled principles clearly enunciated by repeated decisions of the Supreme Court of the United States.

17. In departing from and overruling, without discussion, comment, or citation, repeated prior decisions of this court.

18. In misconstruing and misapplying the decision of the Supreme Court in Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481.

19. In denying to plaintiff its absolute right (with which, under the circumstances presented by this bill, it is vested by the Constitution and statutes of the United States) to have its cause heard and determined by a federal court of equity.

20. In renouncing and refusing to exercise a jurisdiction which it is the statutory and sworn duty of the court and its members to exert.

21. In, thereby, relegating plaintiff to a situation where, for the protection of its property now devoted to a public use, plain-
478 tiff must either pay an enormous and undoubtedly illegal tax, and then experiment with a state remedy, which may not exist at all, which is visionary, theoretical only, untried, obviously inadequate, beset with the greatest doubts and difficulties, and, at best, certain to be in large measure ineffective; or stand on its rights, refuse payment, resist collection as best it may, and suffer the consequent irreparable injury certain to come, both to itself and to the public.

22. In affirming the order of the court below denying the temporary injunction.

23. In directing, in effect, a dismissal of the bill.

For the several reasons hereinabove assigned, your petitioner respectfully urges that this honorable court has committed error, to the great prejudice and damage of your petitioner, and your petitioner therefore respectfully prays that a rehearing of this cause be granted, to the end that said error may be corrected.

Respectfully submitted,

N. H. LOOMIS,
C. C. DORSEY,
Solicitors for Appellant.

GERALD HUGHES,
E. I. THAYER,
Of Counsel.

Certificate of Counsel.

The undersigned, of counsel for appellant, petitioner herein, hereby certifies that in his judgment the foregoing petition is well founded in law and in equity.

C. C. DORSEY,
Of Counsel for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 11, 1914.

479 (*Opinion on Rehearing.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1914.

No. 4136.

UNION PACIFIC RAILROAD COMPANY, Appellant,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO, et al., Appellees.

Appeal from the District Court of the United States for the District of Colorado.

Before Hook and Smith, Circuit Judges, and Amidon, District Judge.

AMIDON, District Judge, delivered the opinion of the Court on petition for rehearing, as follows:

In a carefully prepared petition for rehearing the following passage from the opinion filed herein is quoted:

"Is the remedy given by Section 5750 adequate? It is difficult to follow the reasoning which would hold that it is not adequate. The evil caused by suits in equity to restrain the collection of taxes is grave, and has often been set forth by courts. Dows v. Chicago, 11 Wall., 108, 112; State Railroad Tax Cases, 92 U. S., 575; Indiana Manufacturing Co. v. Koehne, 188 U. S., 681; Boise Artesian Water Co. v. Boise City, 213 U. S., 276. To correct this evil, statutes of similar import to Section 5750 have been passed in many of the states of the Union. The highest court of Colorado has frequently declared the correction of this evil to have been the object of its statute. Board of Commissioners of Bent Co. v. Atchison, T. & S. F. Ry. Co., 125 Pac., 528. The statute is not attacked upon the ground that it is unconstitutional, nor could such an attack, if made, be sustained. The law is, therefore, valid legislation. It was not intended to be cumulative. Its object was to give an action at law for the recovery of sums paid on account of invalid taxes in place of a suit in equity to restrain their collection. Under such cir-
480 cumstances does it lie with the courts to say that the remedy which the legislature has provided is inadequate, and that the remedy which it has condemned shall, therefore, be continued? This would be to make the law of no effect through the traditions of equity. It would not only be judicial legislation, but would nullify a statute which is conceded to be constitutional. It is a mistake to view this statute as relating to procedure only. It creates a right in favor of the aggrieved taxpayer, and, from considerations of the highest public policy, abolishes the right to stay the collection of public revenues by injunction. The courts may not rightfully nullify it upon the ground that the remedy which it gives is less ade-

quate than the one which it takes away. The statute being constitutional, the judgment of the legislature on that subject must control. Such statutes have been frequently before the Supreme Court, and have been uniformly held to afford a plain, speedy and adequate remedy such as excludes the right to resort to equity."

In regard to this passage the petition proceeds as follows:

"We respectfully assert that this is revolutionary doctrine. From the foundation of the federal judicial system until this court spoke in the present case, it had been held by an unruffled current of authority, including repeated decisions of the Supreme Court of the United States, that equity jurisdiction of the federal courts was to be determined in accordance with the general principls of equity as the same existed in 1789, at the time of the adoption of the first judiciary act, etc."

This is a grave charge, especially grave when made by the eminent counsel who sign the petition. It has, therefore, received careful consideration.

The rule which the passage of our opinion is supposed to violate is stated as follows in Payne v. Hook, 7 Wall., 425, 430:

"We have repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different states could not be impaired by the laws of states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial powers. If legal remedies are sometimes modified to suit the changes in the laws of states and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on
481 the federal courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union."

The case in which this language was used was as follows: An administrator in the State of Missouri had wasted the estate and converted the same to his own use, and been guilty of other gross frauds. An heir of the estate residing in Virginia filed a bill against the administrator asking that he be compelled to account, that certain fraudulent instruments be set aside, and plaintiff's distributive share be ascertained, and a decree entered for its payment. The statute of Missouri conferred exclusive jurisdiction in the administration of estates of deceased persons upon the probate courts of the state. The administrator objected to the suit in the federal court upon the ground that this remedy in the probate court was plain and adequate, and exclusive of all redress by plenary suit in equity. Under the laws of Missouri a citizen of that state seeking redress similar to that sought by the plaintiff, would have been compelled to go into the probate court, and it was contended that a citizen of Virginia could have no other remedy. The Supreme Court rules that this remedy in the courts of the state could not be pursued in the federal courts, and could not be given effect so as to destroy the jurisdiction of those courts as created by the constitution and laws of the national government.

Another case cited in the petition for rehearing is Smythe v. Ames, 169 U. S., 466. That was a suit brought by railroad companies having lines in the State of Nebraska to restrain the enforcement of a schedule of rates fixed by the Railway Commission of that state. The local statute authorized any railroad company to show, in a proper action brought in the Supreme Court of the state, that the rates prescribed by the Commission were unreasonable and unjust, and if that court found such to be the fact, to obtain an order upon the Railway Commission permitting the rates to be raised, etc. It was objected to the jurisdiction of the federal court that this remedy was plain and exclusive. The Supreme Court ruled that the remedy could not be pursued in the federal courts, and that as the case made by the bill showed a controversy clearly within the jurisdiction of those courts, the granting of this statutory remedy which was available in the state court alone, could not have the effect to destroy jurisdiction of the federal courts.

482 A great many cases of similar character are cited and quoted from in the petition for rehearing. Among them are the following: McConihay v. Wright, 121 U. S., 201, 205; Mississippi Mills vs. Cohn, 150 U. S., 202; Borer v. Chapman, 119 U. S., 587, 600; Kirby v. Lake Shore & Michigan Southern R. R., 120 U. S., 130, 137; Butler Bros. Shoe Co. v. United States Rubber Co., 156 Fed., 1; Spencer v. Watkins, 169 Fed., 379; McClellan v. Carland, 187 Fed., 915; National Surety Co. v. State Bank, 120 Fed., 593. In all of these cases the remedy given by the state statute was confined to state courts or could not be asserted by a citizen of another state in the Federal Courts.

What bearing have these authorities on the present case? In the absence of a statute, the payment of a tax, with few exceptions, is held to be voluntary, and though the tax may be invalid, the money paid cannot be recovered. This is especially true of taxes upon real property. The process by which such taxes are collected is so gradual, and affords so many opportunities of resistance, that the courts have almost uniformly held that there can be no such duress as to such taxes as to render their payment involuntary. The statute of Colorado here under consideration changes that law. It provides that in all cases in which a person shall pay a tax which is for any reason erroneous or illegal, the board of county commissioners shall refund the same without abatement or discount. This is substantive law. It gives a new right. The statute has nothing to do directly with the law of procedure. The remedy for the enforcement of the right which it gives is not prescribed by the statute. That remedy is a suit at law. It is given by the common law. That is the remedy now, was the remedy in 1789, and for some centuries before that date. This remedy, as Mr. Justice Van Devanter points out in Singer Sewing Machine Co. v. Benedict, 229 U. S., 481, is available in the Federal Courts the same as in the state courts.

In the passage quoted from our opinion we thought we made it plain that this statute does not provide a remedy in the sense that that term is used in the law of procedure. It deals only with the substantive rights of property owners. It is remedial only in

the sense of a substantive law which corrects a known evil. It is too elementary for discussion that such laws of the several states are as binding upon federal courts, sitting in those states, as upon
483 the local courts. We are, therefore, brought back to the conclusion reached in that part of our opinion which is criticized, namely, that the statute lies in a field of legislative rather than judicial discretion.

The inapplicability of the decisions cited in the petition for rehearing is made quite plain by the opinion of this court in National Surety Company v. State Bank, 120 Fed., 593, 602. It is there said as follows: "It is an absence of an adequate remedy at law in the national courts, and that alone, which conditions jurisdiction in equity in those courts. States cannot by conferring jurisdiction upon their own courts alone, oust the jurisdiction of federal courts. Nor can they, by creating a remedy which, in the system of practice that obtains in the federal courts, cannot be pursued there, destroy the jurisdiction of those courts. But, as we have pointed out, there are, in the present case, no such difficulties. The statute of Colorado simply grants to a property owner the right to have any sum exacted from him by an illegal tax refunded. The remedy for the enforcement of such a right is now, and has always been an action at law. When facts which confer federal jurisdiction exist, the right can be enforced in the federal courts by precisely the same remedy as in the state courts.

It is well established, as counsel for appellant contend, that state legislation on the subject of procedure cannot impair the remedial powers of federal courts of equity. Over against this, however, stands the equally well established principle that the legislature of the state may, within constitutional limits, change the substantive law. Such changes will, of necessity, frequently produce changes in remedial relief. A system of practice which took no account of changes in the substantial rights of litigants would be anomalous indeed. Whole departments of equitable jurisdiction have been swept away by changes in the substantive law. The rights of married women and of assignees of choses in action are familiar illustrations. In 1789, and for some decades thereafter, equity had exclusive jurisdiction of such rights. Changes in substantive law have so completely obliterated that jurisdiction that a reference to it is beginning to seem antiquarian. A statute which gives a new right that may be enforced by an action at law, may remove the very evil which was the ground of equitable jurisdiction. When such
484 a statute is passed it must be taken in connection with Section 723 of U. S. Rev. St., and the combined result must produce a change in the right to equitable relief in the federal courts.

This is not the first time that the argument set forth in the petition for rehearing has been presented in federal courts. In 1789 a mortgagee was entitled in the High Court of Chancery of England to a decree of strict foreclosure forever barring the rights of the mortgagor without any period of redemption. When the State of Illinois passed a law requiring a sale of the mortgaged premises and giving to the

mortgagor a year within which to redeem his property, the federal court of that state, responding to the argument that is here made that state statutes cannot in any way affect the equitable jurisdiction of federal courts, passed a decree of strict foreclosure denying to the mortgagor the benefit of the state statute. The case was taken to the Supreme Court. It is the case of Brine v. Insurance Co., 96 U. S., 627. The argument is presented there with such fulness, that we shall quote from the opinion at length.

"It is denied that these statutes are of any force in cases where the decree of foreclosure is rendered in a court of the United States, on the ground that the equity practice of these courts is governed solely by the precedents of the English Chancery Court as they existed prior to the Declaration of Independence, and by such rules of practice as have been established by the Supreme Court of the United States, or adopted by the circuit courts for their own guidance. And treating all the proceedings subsequent to a decree which are necessary for its enforcement as a matter of practice, and as belonging solely to the course of procedure in courts of equity, it is said that not only do the manner of conducting the sale under a decree of foreclosure, and all the incidents of such a sale, come within the rules of practice of the court, but that the effects of such a sale, on the rights acquired by the purchaser and those of the mortgagor, and his subsequent grantees, are also mere matters of practice to be regulated by the rules of the court, as found in the sources we have mentioned.

"On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which
485 the title to real property is transferred, whether by deed, by will, or by judicial proceeding, are subject to, and may be governed by, the legislative will of the state in which it lies, except where the law of the state on that subject impairs the obligation of a contract. And that all the laws of a state existing at the time a mortgage or any other contract is made, which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

"We are of opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the Federal courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition that where substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. * * *

"If one or the other must give way, good sense unhesitatingly requires that justice and positive rights, founded both on valid statutes and valid contracts, should not be sacrificed to mere questions of mode and form. * * *

"It is not denied that in suits for foreclosure in the courts of that state the right to redeem within twelve months after the sale under a decree of foreclosure is a valid right, and one which must govern those courts.

"Nor is it pretended that this court, or any other Federal court, can, in such case, review a decree of the state court which gives the right to redeem. This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court, whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right. * * *

486 "We are not insensible to the fact that the industry of counsel has been rewarded by finding cases even in this court in which the proposition that the rules of practice of the Federal courts in suits in equity cannot be controlled by the laws of the states, is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights conferred by the statute of a state."

Missouri, Kansas & Texas Trust Co. v. Krumseig, decided in this court, 77 Fed., 32, and affirmed in the Supreme Court, 172 U. S., 531, involved a usury statute of the State of Minnesota, which declared that all mortgages tainted with usury should be void, and should be cancelled by the court. This statute, as interpreted by the highest court of Minnesota, is directly in conflict with a principle of equity law and practice uniformly enforced in the High Court of Chancery in England, and in the federal courts, which requires that any person seeking relief against a usurious mortgage shall do equity by paying the amount of the debt, with legal interest. The plaintiff brought the suit to have the mortgage cancelled for usury without making the tender required by this ancient rule of equity jurisprudence. It was urged that the statute of the state could not alter or impair the system of jurisprudence as administered in federal courts of equity. The argument as applied to the particular case was persuasive. It divided this court and produced a strong dissenting opinion. The majority of the court, however, upon a careful review of the decisions of the Supreme Court, held that the statute was binding upon federal courts. The reasons for the rule have never been better stated than in the prevailing opinion rendered at that time. The case was taken to the Supreme Court and affirmed. We shall not prolong this opinion by quoting from either of the opinions. They are not only binding upon us as authority, but meet with our entire approval as a sound exposition of the law.

We are convinced that the right of a state to provide for the prompt payment of its revenues stands upon ground quite as clear and high as its right to regulate the transfer of property by private individ-

uals, or to prescribe the relief to be given against a usurious contract.

We are aware that the right which the statute gives may not
487 be as advantageous to property owners as the former right to keep their money and litigate the tax. What we insist is that the whole matter lies in the field of substantive law where the legislature, acting within constitutional limits, has the right to prescribe the rule. This is not only true as a matter of power, but the history of taxation as written in the opinions of the Supreme Court, shows that the legislation is amply justified on grounds of public policy.

It is urged in the petition that the statute has not been held by the courts of Colorado to exclude a resort to equity. We have examined all the authorities cited, and have reached the conclusion that there is no decision in the Supreme Court of Colorado which qualifies the exposition given in Board of Commissioners of Bent Co. v. Atchison, Topeka & Santa Fe R. R. Co., 125 Pac., 528; nor is there any decision of that court in which the question has been raised and considered in which the right to restrain the collection of taxes by injunction has been sustained. We further observe that the Supreme Court had before it this question in the Singer Sewing Machine Company case, and there ruled that the statute of Colorado affords a plain, speedy and adequate remedy, such as excludes a resort to equity, unless circumstances are shown which render the remedy inadequate. The Supreme Court in that opinion also reviewed the decision of Colorado, and ruled that this was the interpretation of the statute given by those decisions. We consider these views binding upon us.

We will add a word in regard to "equitable circumstances." In the original brief and in the brief in support of the petition counsel for appellant contend that whenever any equitable circumstance such as fraud, cloud upon title, or multiplicity of suits, exists, a case is made out which will support jurisdiction in equity, and an injunction to restrain the collection of the tax. This, however, is the rule in the absence of a statute like that of Colorado. From the decision in Dows v. Chicago, 11 Wall., 108, to the present time, the Supreme Court has declared with increasing emphasis that no relief can be given in a Federal Court of Equity against the collection of a tax, whatever the cause of its invalidity may be, unless one or more of these equitable circumstances are shown to exist. The result of counsel's argument is that the same rule is applied with the statute as without it. The contention, if sustained, would completely nullify the statute as a means of securing the prompt payment of public revenues. What effect should legislation
488 like the statute of Colorado have upon these equitable circumstances? Take, for example, cloud upon title. Equitable jurisdiction under that head arose out of the fact that the payment of the tax was treated at common law as voluntary. If the property owner removed the cloud paying the tax, he had no remedy by which he could recover his money. The only way in which he could relieve his property from the lien of the illegal tax, without forfeiting his money, was to go into equity. It is entirely plain that a statute

like that of Colorado removes this ground of equitable jurisdiction. Under its provisions the property owner may pay the tax, and if he can show that any part of it is illegal, he has the right to recover the same without abatement. Every tax upon real property is a cloud upon its title. Has every owner of such property in Colorado who believes a tax upon it to be invalid, the right to go into equity, enjoin the collection of the tax, and have it cancelled as a cloud upon his title? Would not the courts say to such a plaintiff: "Pay your tax. That will remove the cloud. Then if you can show that any part of the tax is invalid, you will be entitled to a proportionate refund of your money."

There are circumstances under which the enforcement of the right given by the statute would lead to results against which equity will grant relief. Taylor v. Louisville & Nashville R. R. Co., 88 Fed., 351, and Fargo v. Hart, 193 U. S., 490, are good examples of this class. There state boards of equalization were about to certify to a large number of counties taxes which were shown to be illegal. When thus certified it became the duty of the local officers to enforce their payment. Complainants, to avail themselves of the statute, would have been compelled to maintain a large number of independent suits at law, and the right to go into equity is based upon the ground of preventing this multiplicity of suits. The whole matter is made clear in Pullman Co. v. Tamble, 173 Fed., 200. There suit was brought against the collection officer of a county to restrain the enforcement of a tax after it had been certified to the several counties of the state. Taylor v. Louisville & Nashville R. R. Co., 88 Fed., 350, and Fargo v. Hart, 193 U. S., 490, are distinguished in a careful opinion, and the right to resort to equity was denied. The Pullman Company accepted this interpretation of the statute of Tennessee, similar to the statute of Colorado, paid its tax, and brought suit to recover back the payment. Tamble v. Pullman Company, 207 Fed., 30.

489 When a statute like that in Colorado exists, complainant seeking to restrain the collection of a tax must do more than show some of the equitable circumstances which would support a resort to equity if there were no statute. He must make out a case of quite exceptional character, such as Cummings v. National Bank, 101 U. S., 153, which shows a right to enjoin the tax notwithstanding the statute,—a case in which compliance with the statute would, in the language of the Supreme Court, cause "irreparable injury." Such a case will be held to fall outside the intent of the law. The answer which the Supreme Court gave in the Cummings case to the contention that plaintiff had an adequate remedy under a state statute similar to that in Colorado, shows what is necessary to give such jurisdiction in equity:

"It is next suggested that since there is a plain, adequate and complete remedy by paying the money under protest and suing at law to recover it back, there can be no equitable jurisdiction of the case.

"The reply to that is that the bank is not in a condition where the remedy is adequate. In paying the money it is acting in a fidu-

ciary capacity as the agent of the stockholders,—an agency created by the statute of the state. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank as a corporation is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall. If it pays it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends, and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the state. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of duties appertaining to it. To prevent multiplicity of suits, equity may interfere."

It is further urged as an equitable circumstance that the case involves complicated issues and difficult mathematical calculations unfit for trial by jury. The case does not seem to us more difficult than many commercial causes that are tried by jury. If, however, the ascertainment of the amount or refund to which plaintiff would be entitled should involve issues so complex as to support a resort to equity, it may go into equity for that purpose. That,
490 nevertheless, would furnish no ground for an injunction to stay the collection of the tax, the denial of which is the basis of this appeal. To suspend payment of public revenue during litigation, is to defeat the object of the statute. Surely a court of equity will not do that without cause any more than a court of law. Ascertaining the amount of plaintiff's refund, if any, by a chancellor, is no more cause for enjoining the tax than the same assessment by a jury would be. As the plaintiff has not paid its tax, it has no standing in any court, either of law or equity, to have the amount of its refund, if any, ascertained.

We have carefully examined the petition for rehearing and find in it no cause to modify our opinion. It is, therefore, denied.

Filed February 12, 1915.

HOOK, *Circuit Judge*, concurring:

No one will seriously contend that a State may define or regulate the equity jurisdiction of the courts of the United States. On the other hand it cannot be doubted that the materials upon which that jurisdiction operates may be proper subjects of state legislation and that changes in the substantive structure of rights may have an important effect upon the method of judicial enforcement or adminstration. Again, in cases not inherently of exclusive equitable cognizance but where the right to resort thereto rests upon an inadequacy of the remedy at law it would seem clear that a legislative act of the state making the remedy adequate would, with Sec. 723 Rev. Stat., result in a loss of jurisdiction in equity. So the doctrine stated at the outset should not be taken too broadly. I also think that whenever the question whether a remedy at law given by a state statute is plain, adequate and complete arises in a court of the United States having the fundamental grounds of federal jurisdiction, it is for that court to determine. In other

words, the statute can not foreclose the consideration of such a question.

In the case at bar I would feel constrained to follow the decision in Atchison, T. & S. F. R. Co. v. Sullivan, 97 C. C. A., 1, 173 Fed., 456, were it not for the later case of Singer Sewing Machine
491 Co. v. Benedict, 229 U. S., 481. And it is with some hesitation that I conclude that the latter rules the sufficiency of the remedy at law in Colorado in a case like that set up in the bill of complaint.

Filed February 12, 1915.

492 (*Order Denying Petition for Rehearing.*)

December Term, 1914.

FRIDAY, February 12, 1915.

This cause came on this day to be heard upon the petition for a rehearing, filed by Counsel for Appellant, and the briefs filed in support thereof.

On consideration whereof, it is now here ordered by this Court, that said petition for a rehearing of this cause, be, and the same is hereby, denied.

February 12, 1915.

(*Motion for Stay of Mandate.*)

Now comes the appellant above named, by its solicitors, and respectfully moves the court for an order staying the issuance of mandate herein for a period of sixty days from and after the date of the order denying the petition for rehearing herein, or for such other period of time as to the court may seem meet and proper, for the purposes hereinafter mentioned, and further staying the issuance of such mandate in case the Supreme Court assumes jurisdiction of this controversy, either on appeal or by writ of certiorari, until such time as the Supreme Court shall have finally disposed thereof; and for grounds of such motion shows unto the Court:

First. That appellant proposes to and will, with such expedition as possible, prepare, file and present the necessary papers and make application for and perfect an appeal herein to the Supreme Court of the United States, and likewise prepare, file and present the necessary papers and make application to the Supreme Court of the United States for the writ of certiorari herein, or will pursue one or the other of said courses, as may seem proper and advisable; that these steps will be taken without any delay whatsoever, but owing to the great distance at which counsel resides from the places where said courts are held, where the judges thereof reside, and
493 where the clerks' offices are maintained, it will be impossible to prepare and present said papers and perfect said appeal or

make application for said writ of certiorari, prior to the time when mandate must issue if the provisions of rule 32 of this court, as supplemented by the standing order of March 30, 1911, be strictly observed.

Second. That if a mandate be forthwith issued as contemplated by the strict letter of said rule 32 of this court, the restraining order now in effect (printed record, pages 205-209), and which prevents the seizure and sale of appellant's property, will forthwith, upon the receipt of said mandate by the trial court, be dissolved, appellant's property seized, sold and otherwise interfered with, and the appeal or other proceeding for the review of the decision herein rendered nugatory.

Third. That if a mandate be forthwith issued as contemplated by the strict letter of said rule 32 of this court, the result will be the entry in the lower court of a judgment against appellant for a very large sum of money accrued as costs herein, and said lower court will be at liberty to enforce the collection thereof by the usual process prior to the time when proceedings for the review of the decision by the Supreme Court of the United States can by the utmost diligence be perfected.

N. H. LOOMIS,
C. C. DORSEY,
Solicitors for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 12, 1915.

(*Order Staying Mandate.*)

December Term, 1914.

MONDAY, February 15, 1915.

Upon consideration of the motion of counsel for appellant for an order staying the mandate herein, it is now here ordered that the mandate in this cause be, and is hereby, stayed for a period
494 of sixty days from and after the 12th day of February, 1915, pending an application to the Supreme Court of the United States for a writ of certiorari to review the decision of this Court or for the prosecution of an appeal to said Supreme Court, or both.

Dated, February 15, 1915.

WILLIAM C. HOOK,
U. S. Circuit Judge, Eighth Circuit.

(*Petition for Appeal to the Supreme Court of the United States.*)

The above named appellant respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that a decision, order and decree has therein been rendered and entered on the 12th day of October, A. D. 1914, affirming an order of the United States District Court for the District of Colorado, which denied an application

for temporary injunction, and likewise, in effect, directing said District Court to dismiss this suit; that thereafter, and within the time provided by the rule, a petition for rehearing was filed in said cause on behalf of appellant, and said cause remained pending upon said petition until the 12th day of February, A. D. 1915, at which time said petition for rehearing was dened; that the matter in controversy in said suit exceeds One Thousand Dollars ($1,000) besides costs; that this cause is one of which the United States Circuit Court of Appeals for the Eighth Circuit has not final jurisdiction; that the decision, order and decree of said Circuit Court of Appeals is in effect a final disposition of said cause, and that this is a proper cause to be reviewed by the Supreme Court of the United States.

Wherefore, appellant prays that an appeal be allowed it in the above entitled cause to the Supreme Court of the United States, and that the Clerk of the United States Circuit Court of Appeals
495 for the Eighth Circuit be directed, in accordance therewith, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors heretofore presented and herewith filed by the said appellant, may be reviewed and, if error be found, corrected, according to the laws and customs of the United States.

N. H. LOOMIS,
C. C. DORSEY,
Solicitors for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 24, 1915.

(*Assignment of Errors on Appeal to the Supreme Court of the United States.*)

The appellant in the above entitled cause, in connection with and preliminary to the filing of its petition for appeal herein, presents and files herewith its assignment of errors, as to which matters and things it says that the decision, order and decree entered herein on the 12th day of October, A. D. 1914 (rehearing denied February 12, 1915) is erroneous; that in the record and proceedings herein there is manifest error, and that the United States Circuit Court of Appeals for the Eighth Circuit erred in this, to-wit:

1st. In holding and deciding that the federal court of equity was without jurisdiction of this cause.

2nd. In holding and deciding that a plain, speedy and adequate, or any, remedy at law existed.

3rd. In holding and deciding that the Colorado statute referred to in the opinion could or did contract, control, condition, or in any manner limit the equity jurisdiction of the federal court.

4th. In holding and deciding that a remedy at law given by a state statute, even though plain, certain, speedy, adequate and com-

plete, could or did oust, limit, or at all affect equity juris-
496 diction of the federal court otherwise existing.

5th. In renouncing equity jurisdiction when it was invoked upon several well-sustained grounds, such as were recognized, enforced and acted upon by the High Court of Chancery in England in 1789, and therefore made a permanent part of federal equity jurisprudence and jurisdiction by the Constitution and statutes of the United States.

6th. In assigning to a state statute a potency and effect which it could not possibly possess, no matter what its provisions.

7th. In holding that the statutory remedy, if any, is exclusive.

8th. In holding that the state statute precludes an inquiry by the federal court of equity as to the certainty, scope and adequacy of the remedy afforded thereby.

9th. In holding that the equity jurisdiction of the federal court is destroyed by the state statute, however great may be the doubt as to the availability, scope and efficacy of the statutory remedy.

10th. In holding that the statutes of the State of Colorado afforded a remedy for all or any of the grievances here complained of.

11th. In holding that moneys paid on account of the disputed tax could be recovered back, in whole or in part, in an action at law.

12th. In holding that moneys paid on account of the disputed taxes claimed by cities, towns and school districts could be recovered back, in whole or in part, in an action at law.

13th. In holding that moneys paid on account of said disputed taxes could be recovered back in one action at law, or without a multiplicity of suits.

14th. In holding that all of the moneys paid on account of said disputed taxes could be recovered back by any course of procedure, or in any form of action at law, or otherwise, or under any circumstances whatever.

15th. In misconstruing and misapplying the statutes of the State of Colorado.

16th. In misconstruing and misapplying the decisions of the Supreme Court and Court of Appeals of the State of Colorado.

497 17th. In misconstruing and misapplying the decision of the Supreme Court in Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481.

18th. In denying to appellant its absolute right (with which, under the circumstances presented by this bill, it is vested by the Constitution and statutes of the United States) to have its cause heard and determined by a federal court of equity.

19th. In renouncing and refusing to exercise, and in directing the trial court to renounce and refuse to exercise, a jurisdiction imposed by the Constitution and statutes of the United States.

20th. In thereby relegating appellant to a situation where, for the protection of its property now devoted to a public use, appellant must either (1) pay an enormous and clearly illegal tax, and then experiment with a state remedy, which may not exist at all, which is visionary, theoretical only, untried, obviously inadequate,

beset with the greatest doubts and difficulties, and, at best, certain to be in large measure ineffective; or (2) stand on its rights, refuse payment, resist collection as best it may, and suffer the consequent irreparable injury certain to come both to itself and to the public.

21st. In affirming the order of the court below denying the temporary injunction.

22nd. In denying the petition for rehearing.

23rd. In directing, in effect, a dismissal of the bill.

Wherefore, appellant prays that the decision, order and decree of said Circuit Court of Appeals may be reversed, and the case remanded, with directions to issue the temporary injunction; and for such other and further relief as to the court may seem meet and just.

N. H. LOOMIS,
C. C. DORSEY,
Solicitors for Appellant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 24, 1915.

498 (*Bond on Appeal to the Supreme Court of the United States.*)

Know all men by these presents, That we, Union Pacific Railroad Company, as Principal, and National Surety Company of New York, as Surety, are held and firmly bound unto The Board of County Commissioners of the County of Weld, State of Colorado; W. R. Patterson, as County Treasurer of said County, and S. J. McAfee, as Sheriff of said County, in the full and just sum of Three Thousand Dollars, to be paid to the said obligees above named, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, and each of our successors, heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of March, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, the appellant in the above entitled cause has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in said cause in the United States Circuit Court of Appeals for the Eighth Circuit on the 12th day of October, A. D. 1914;

Now, therefore, the condition of the above obligation is such that if the said Union Pacific Railroad Company, appellant, shall prosecute said appeal to effect, and answer all damages and costs if it fails to make good its said appeal, then the above obligation to be void; otherwise to remain in full force and virtue.

UNION PACIFIC RAILROAD COMPANY,
By CLAYTON C. DORSEY, *Its General Attorney.*
[SEAL.] NATIONAL SURETY COMPANY,
By L. J. NICHOLS, *Attorney in Fact.*

The foregoing bond is approved this 24th day of March, A. D. 1915.

WALTER H. SANBORN,
Senior United States Circuit Judge for the Eighth Circuit.

499 STATE OF MISSOURI,
City of St. Louis, ss:

On this 24th day of March, 1915, before me appeared L. J. Nichols to me personally known, who, being by me duly sworn, did say that he is the attorney-in-fact of the National Surety Company, a corporation organized and existing under the laws of the State of New York, in and for the City of St. Louis, Missouri, and that the seal affixed to the foregoing instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation, by Authority of its Board of Directors, and said L. J. Nichols acknowledges said instrument to be the free act and deed of said corporation.

[SEAL.] MARIE E. PAUCK,
Notary Public in and for the City of St. Louis, Missouri.

My Commission expires on May 3rd, 1915.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 24, 1915.

(*Order Allowing Appeal to the Supreme Court U. S.*)

It is hereby ordered that the appeal in the above entitled cause to the Supreme Court of the United States be, and is hereby, allowed as prayed, this 24th day of March, 1915.

WALTER H. SANBORN,
Senior United States Circuit Judge for the Eighth Circuit.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 24, 1915.

500 (*Præcipe for Record on Appeal to the Supreme Court of the United States.*)

Comes now the appellant above named, and, pursuant to Equity Rule 75, subdivision (*a*), and Supreme Court Rule 8, subdivision 1, files this its præcipe, which indicates the portions of the record to be incorporated into the transcript on the appeal heretofore allowed herein to the Supreme Court of the United States, and hereby requests that there be incorporated into the transcript on such appeal the following, to-wit:

The entire record of the case, including all proceedings in the Circuit Court of Appeals, also all proceedings in the District Court, as set forth in the transcript of the record of the latter court on

file in and made the basis of the judgment of the Circuit Court of Appeals in this cause. Appellant particularly requests that said transcript of the record be complete, and that it include not only a transcript of the record in the lower court as filed in the Circuit Court of Appeals, but also all proceedings, orders, opinions and decrees in the Circuit Court of Appeals itself, including the original opinion and the order or decree entered thereon, the petition for rehearing, the two opinions filed on said petition, and the order or decree entered thereon, the order for stay of mandate, and all papers, proceedings and orders relating to the appeal.

N. H. LOOMIS,
C. C. DORSEY,
Solicitors for Appellant.

Received a copy of the foregoing præcipe, at Denver, Colorado, this 26th day of March, A. D. 1915.

CHARLES F. TEW,
W. E. BLISS,
Solicitors for Appellees.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 29, 1915.

501 UNITED STATES OF AMERICA,
Eighth Judicial Circuit, ss:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

THE UNITED STATES OF AMERICA:

To the Board of County Commissioners of the County of Weld, State of Colorado; W. R. Patterson, as County Treasurer of said County, and S. J. McAfee, as Sheriff of said County, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty (30) days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Union Pacific Railroad Company is appellant and you are appellees, to show cause, if any there be, why the decree rendered against said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable Walter H. Sanborn, Senior United States Circuit Judge and Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 24th day of March, A. D. 1915.

WALTER H. SANBORN,
Senior United States Circuit Judge and Judge of the United States Circuit Court of Appeals for the Eighth Circuit.

502 The Appellees named in the within citation, and to whom it is directed, hereby acknowledge service of said citation, by delivery to and receipt by them of a copy thereof, at Denver, Colorado, this 26th day of March, A. D. 1915.

CHARLES F. TEW,
W. E. BLISS,
Solicitors for Appellees.

503 [Endorsed:] Supreme Court of the United States, No. —. October Term, 1914. Union Pacific Railroad Company. Appellant, vs. Board of County Commissioners of the County of Weld, State of Colorado, et al. Citation. Filed Mar. 29, 1915. John D. Jordan, Clerk.

504 (*Petition for Continuance of Restraining Order Pending Review by the Supreme Court of the United States.*)

Comes now appellant above named and respectfully petitions the court that, in aid of the appeal to the Supreme Court of the United States this day allowed in this cause, and in accordance with the letter and spirit of Equity Rule 74, and pursuant to the practice of federal courts of equity in that behalf, and in order that the status quo may be maintained during the pendency in the Supreme Court of the United States of proceedings to review this court's decision herein, a definite order be now made continuing in effect until such time as this cause may have been disposed of by the Supreme Court of the United States the restraining order now in effect (Printed Record, pp. 205-209), which prohibits the defendants from enforcing the collection of the disputed taxes.

And in support of said petition, your petitioner respectfully shows that, as appears from its supplemental bill of complaint herein filed (Printed Record, p. 37), it has paid the amount conceded to be due on account of said taxes, to-wit, $46,691.04, leaving unpaid a balance of the total amount claimed by defendants to be due in the sum of $31,127.37; that, as appears from the pleadings herein and from the showing made, the defendants claim and assert the right, insist that it is their official duty to, and declare that they will without delay collect said balance, by seizure, distraint, sale, and otherwise, as the laws of the State of Colorado direct; that unless said restraining order continue in effect the status quo will during the pendency in the United States Supreme Court of said proceedings to review be so altered as to render any relief which appellant might obtain upon said proceedings entirely inneffectual, and said proceedings themselves nugatory.

N. H. LOOMIS,
C. C. DORSEY,
Solicitors for Appellant-Petitioner.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 31, 1915.

505 (*Order Continuing in Effect Restraining Order Heretofore Issued.*)

On application of appellant, and in aid of the appeal to the United States Supreme Court this day granted, it is hereby ordered that the restraining order issued herein by the District Court on November 10, 1913, prohibiting the collection or attempted collection of the taxes in dispute, remain in effect pending the disposition of this cause by the United States Supreme Court.

WILLIAM C. HOOK,
United States Circuit Judge and Judge of the United States Circuit Court of Appeals for the Eighth Circuit, Presiding at the Hearing of this Cause.

March 31, 1915.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 31, 1915.

506 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Colorado as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the præcipe of counsel for appellant, in a certain cause in said Circuit Court of Appeals wherein Union Pacific Railroad Company is Appellant and The Board of County Commissioners of the County of Weld, State of Colorado, et al., are appellees, No. 4136, as full, true and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth

Circuit, at office in the City of St. Louis, Missouri, this eighth day of April, A. D. 1915.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Apr. 8, 1915. John D. Jordan.]

Endorsed on cover: File No. 24,670. U. S. Circuit Court Appeals, 8th Circuit. Term No. 431. Union Pacific Railroad Company, appellant, vs. The Board of County Commissioners of the County of Weld, State of Colorado, et al. Filed April 12th, 1915. File No. 24,670.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 431.

UNION PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO; W. R. PATTERSON, AS COUNTY TREASURER OF SAID COUNTY; AND S. J. McAFEE, AS SHERIFF OF SAID COUNTY, RESPONDENTS.

NOTICE

The respondents above named are hereby notified that said petitioner will on Monday, the 31st day of January, 1916, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, submit to the Supreme Court of the United States, in its court room at the Capitol in the City of Washington, D. C., its petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit in

the cause in said petition described; a copy of said petition for writ of certiorari and of the brief in support thereof being herewith delivered to said respondents.

N. A. Loomis

L. C. Dorsey

Solicitors for Petitioner.

Receipt of copies of the foregoing notice and of the petition and brief therein mentioned is hereby acknowledged, at Denver, Colorado, this 18th day of January, A. D. 1916.

Signed Charles F. Teu

Walter E. Bliss

Solicitors for Respondents.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 431.

UNION PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO; W. R. PATTERSON, AS COUNTY TREASURER OF SAID COUNTY; AND S. J. McAFEE, AS SHERIFF OF SAID COUNTY, RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

Comes now Union Pacific Railroad Company, a corporation organized and existing under the laws of the State of Utah, the petitioner above named, and

respectfully petitions this Honorable Court to issue its writ of certiorari, directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, directing said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings in said Court had in a certain cause hereinafter mentioned, to the end that said cause may be reviewed and determined by this Honorable Court, and that the decree of the Circuit Court of Appeals therein may be reviewed and revised by this Honorable Court; and in support of said petition and in explanation thereof, your petitioner respectfully avers:

1. That said cause is already pending in this Court on appeal, and a certified copy of the entire transcript of the record in the cause, including the proceedings in the court to which the writ of certiorari is asked to be directed, is already on file here in said appeal. To this record petitioner refers in support of its petition, and to that end files its said petition in the cause pending on appeal.

2. This petitioner is appellant, and the respondents are appellees, in said appeal. Petitioner and appellant is confident of the propriety of said appeal, and that this court has jurisdiction of the cause thereunder. No question of this court's jurisdiction upon the appeal has as yet been raised. When it arises, if at all, appellant is prepared to meet it with authorities and reasons, which it believes conclusively support the Court's jurisdiction.

Nevertheless, out of an abundance of caution, this petition is presented within the period permitted therefor, to the end that the decision and decree of the

Circuit Court of Appeals may now be reviewed and revised, either upon appeal or by certiorari, because, as it believes and is advised, unless such review can now be had it cannot be had at all, for the reasons hereinafter stated.

In view of the great general importance of the principal question involved and the wide-spread effect of its decision, petitioner is fully persuaded and earnestly represents that the same should be reviewed by this Court. This is wholly aside from the consideration of the large amount involved in the present suit.

The course pursued by petitioner as outlined above has received the sanction of this Court on numerous occasions.

Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S., 138, 144, 145.

American Sugar Refining Co. v. New Orleans, 181 U. S., 277, 279, 283.

Security Trust Co. v. Dent, 187 U. S., 237, 239.

Farrell v. O'Brien, 199 U. S., 89, 93, 99, 101.

Cochran v. Montgomery County, 199 U. S., 260, 263, 270.

Whitney v. Dick, 202 U. S., 132, 134, 135.

Montana Mining Co. v. St. Louis Mining Co., 204 U. S., 204, 208, 212, 213, 214.

White-Smith Music Co. v. Apollo Co., 209 U. S., 1, 8.

Under these circumstances, petitioner is entirely willing, indeed it ventures to suggest, that the determination of this petition for certiorari be passed until the oral argument upon the appeal, or until such time as the question of jurisdiction upon the appeal be properly raised. This also, as petitioner understands, is in accordance with the settled practice of the Court under like conditions.

3. The case originated in the United States District Court for the District of Colorado. A bill in equity was filed by this petitioner against the above named respondents, seeking to have declared invalid a portion of the taxes arising from the assessment for the year 1912, and seeking injunctive relief, both preliminary and final, prohibiting any attempt to collect that part of said taxes alleged to be invalid. All of the taxes not so attacked were paid in full. The ground of invalidity alleged was gross inequality of assessment; that property in the county of Weld other than that of the Railroad Company had been greatly under-assessed as compared with the assessment placed upon the property of the Railroad Company; that this had been brought about by the gross undervaluation of such property and elements of value as were assessed at all, by the total omission from assessment of large classes and items of property and elements of value, although the statute required that all should be assessed, by the application to large classes of property of a wrongful and illegal method or measure of valuation, contrary to the requirements of the statute, resulting in a greatly decreased assessment, by the allowance of exemptions amounting in the aggregate to an enormous sum, contrary to the

express provisions of the statute, and by other numerous and repeated wrongful acts of the authorities making the assessment of property other than that of the Railroad Company. It was further alleged that this course of action upon the part of the local authorities was systematic, intentional, continuous over a long period of years; that it imposed and was intended to impose upon the Railroad Company and its property an undue burden of taxation; and that such repeated wrongs were a fraud upon the Railroad Company or such a gross mistake as in law amounted to a fraud. Federal jurisdiction was founded both upon diversity of citizenship and the existence of a Federal question. Equity jurisdiction was founded upon the systematic, repeated and continuous character of the wrongful acts and consequent fraud or constructive fraud; upon the fact that the taxes alleged to be illegal constituted and would constitute a cloud upon the title to the Railroad Company's real estate; upon the fact that any attempt to collect said taxes in the satutory manner would greatly interfere with and embarrass the plaintiff in the performance of its duties as a common carrier, and result in consequent injury to the public; upon the fact that the complicated evidence and involved issues necessary to a determination of the question of discrimination in assessment required a process analogous to an accounting and demanded the machinery and methods of a court of equity for their proper consideration and determination; upon the fact that unless equity intervened a multiplicity of suits would certainly result; and upon the fact that equity alone could afford complete relief.

Application was made to the trial court for a preliminary injunction. The allegations of the bill were well sustained by proof, but the application was denied. From that order of denial appeal was taken to the Circuit Court of Appeals pursuant to section 129 of the Judicial Code. The decision of the latter court is reported in 217 Fed., 540, and (on rehearing) 222 Fed., 651. The Circuit Court of Appeals, exercising a power which it undoubtedly possessed, although the appeal was from an interlocutory order only, decided a question fundamental to the case, and in effect directed a dismissal of the bill. This of course it had a right to do, although its decision might be wrong.

> City of Denver v. New York Trust Co., 229 U. S., 123, 136.
>
> United States Fidelity & Guaranty Co. v. Bray, 225 U. S., 205, 214.
>
> Harriman v. Northern Securities Co., 197 U. S., 244, 287.

Without in any manner passing or even touching upon the question of the validity or invalidity of the tax or any of the matters pertaining thereto, the Circuit Court of Appeals held that the Court was without jurisdiction of the cause as a court of equity, and that the cause was one which could not be transferred to the law docket, because no cause of action at law at that time existed, thus rendering a decision which finally terminated the litigation, because it necessitated the dismissal of the bill and in effect directed the trial court to enter an order of such dismissal. Petition for rehearing was filed, but the Circuit Court

of Appeals adhered to its decision, although one of the judges expressed some misgivings (222 Fed., 651, 659). Thereupon the Railroad Company brought the case here by appeal, in accordance with what seems decisive authority.

> United States Fidelity & Guaranty Co. v. Bray, 225 U. S., 205, 206, 213, 214, 215.

It now seeks to supplement that appeal by this petition for certiorari, to the end that a review may certainly be had by one or the other method, because under the conditions recited above, unless such review be now had, either upon appeal or by certiorari, no review by this Court can ever be had.

> Metropolitan Water Co. v. Kaw Valley Drainage District, 223 U. S., 519, 520, 523, 524.
>
> Brown v. Alton Water Co., 222 U. S., 325.

4. The court below (the Circuit Court of Appeals) held that this case was not within the jurisdiction of a court of equity, and in effect directed the dismissal of the bill. It did so because, as it held, there existed in the State of Colorado the right, after payment of the disputed taxes, to recover them back in an action or actions at law if in fact they were invalid. It held that this situation ousted equity of its jurisdiction, notwithstanding the fact that such jurisdiction was invoked upon well-settled and anciently recognized grounds (recited in preceding section 3 hereof), and not solely upon the assertion that

the tax was illegal or invalid. It held that the remedy thus provided by Colorado law was intended to be and was exclusive of the remedy in equity, ousted the Federal courts of equity of their jurisdiction, upon whatever ground invoked, and precluded even the Federal courts of equity from inquiring into the efficacy or adequacy of the state remedy so afforded. The court below therefore in effect held that in Colorado and in all other states where the right exists to recover back an invalid tax after payment, a Federal court of equity is without jurisdiction of a suit involving relief against illegal taxation, no matter upon what ground such jurisdiction be invoked.

Singer Sewing Machine Co. v. Benedict, 229 U. S., 481, was referred to as a binding precedent which required the decision as made, although upon rehearing one of the judges of the court below stated that he reached that conclusion with some hesitancy (222 Fed,. 659). We respectfully but most earnestly contend that the learned court below has given a wrong construction and a mistaken application to the decision of this Court in Singer Sewing Machine Co. v. Benedict, supra. We respectfully but most earnestly contend that it was not the intention of this Honorable Court by its decision in the above-mentioned case to hold that equity would be without jurisdiction of such a cause as the record in the case at bar presents, but only to hold, as it had many times held, that equity jurisdiction did not exist where invoked solely upon the assertion that the tax was illegal or invalid, where none of the recognized grounds of equity jurisdiction were made to appear and where an adequate remedy at law existed. We conceive this to be clear

from the reasoning and language of the opinion in the Singer Sewing Machine case and from the facts which the Court was considering.

5. The Circuit Court of Appeals held that because of a statute of the State of Colorado which it conceived gave the right to recover back the invalid tax after payment, Federal equity jurisdiction was ousted and should be renounced, although invoked upon ancient and well-settled grounds, clearly recognized at and prior to the adoption of the first Judiciary Act. We respectfully but earnestly contend that to give such effect to any state statute is in conflict with settled principles repeatedly enunciated by numerous decisions of this Court, including that in Singer Sewing Machine Co. v. Benedict, supra, among which are:

Payne v. Hook, 7 Wall., 425, 430.

Smythe v. Ames, 169 U. S., 466, 516.

McConihay v. Wright, 121 U. S., 201, 205.

Mississippi Mills v. Cohn, 150 U. S., 202.

Borer v. Chapman, 119 U. S., 587, 600.

Kirby v. Lake Shore and Michigan Southern R. Co., 120 U. S., 130, 137.

Ridings v. Johnson, 128 U. S., 212, 217.

United States v. Howland, 4 Wheat., 108, 114.

Waterman v. Canal Louisiana Bank, 215 U. S., 33, 43.

McClellan v. Carland, 217 U. S., 268, 281.

It is likewise in conflict with repeated prior decisions of the Circuit Court of Appeals:

National Surety Co. v. State Bank, 120 Fed., 593, 603.

Butler Brothers Shoe Co. v. United States Rubber Co., 156 Fed., 1, 18.

Dunlop v. Mercer, 156 Fed., 545, 551.

Spencer v. Watkins, 169 Fed., 379, 381.

McClellan v. Carland, 187 Fed., 915, 918.

6. The Circuit Court of Appeals held that the statute of Colorado, as construed by it, "excludes the right to resort to equity," although equity jurisdiction be invoked as here, upon ancient and well-recognized grounds. This is in conflict with repeated decisions of this Court and the various Courts of Appeals in tax cases arising in states whose statutes give a much more complete and comprehensive and adequate remedy at law, by payment and recovery back, than does the statute of Colorado under any possible construction.

Taylor v. Louisville & Nashville R. R. Co. (C. C. A. 6th Circuit), 88 Fed., 350; (Certiorari denied, 172 U. S., 647).

Johnson v. Wells Fargo & Co., 239 U. S., 234, 243 (approving foregoing decision.)

Fargo v. Hart, 193 U. S., 490, 503.

In re Tyler, 149 U. S., 164.

Poindexter v. Greenhow, 114 U. S., 270, 295, 298, 302.

Allen v. Baltimore & Ohio, 114 U. S., 311.

Union Pacific v. Cheyenne, 113 U. S., 516.

San Francisco National Bank v. Dodge, 197 U. S., 70, 75, 110, 111.

Cummings v. National Bank, 101 U. S., 153, 156.

Sanford v. Poe, 69 Fed., 546.

Adams Express Co. v. Ohio, 165 U. S., 194.

Ohio Tax Cases, 232 U. S., 576, 587.

Brown v. French, 80 Fed., 166.

Said decision of the Circuit Court of Appeals is likewise in conflict with its own prior decisions, one of them relating to the same Colorado statute.

A. T. & S. F. Ry. Co. v. Sullivan, 173 Fed., 456, 469, 470, 471.

Western Union Telegraph Co. v. Trapp, 186 Fed., 114, 121.

Ritterbusch v. A. T. & S. F. Ry. Co., 198 Fed., 46.

Wells Fargo & Co. v. Johnson, 214 Fed., 180.

Johnson v. Wells Fargo & Co., 239 U. S., 234, 243 (affirming the decision last above mentioned).

7. The Circuit Court of Appeals held that cloud or threatened cloud upon title to real estate could not avail as a ground of equity jurisdiction, because such cloud might be removed or prevented by payment of the invalid tax, which could thereafter be sued for at law. But such right, if it ever exists, does not come

into being until after the payment of the disputed tax. The tax being invalid, there exists no obligation to pay. As matters now stand, a complete right in equity and a perfect ground upon which to appeal to its jurisdiction do exist. A suitor in the Federal courts cannot be deprived of this right by any state statute.

8. The Circuit Court of Appeals held that if jurisdiction in equity were renounced, no multiplicity of suits would result, because the disputed taxes could be paid and recovered back in one action at law against the Board of County Commissioners. But in this the learned court below erred.

Because (a), the taxes being invalid, the Railroad Company is under no obligation to pay, but may resist the collection thereof.

> Allen v. Baltimore & Ohio R. R. Co., 114 U. S., 311.
>
> Wells Fargo & Co. v. Johnson, 214 Fed., 180, 189.

This would necessarily result in numerous actions at law, of replevin, detinue, and the like, and suits for damages against the collecting officers when they endeavored to seize, by distraint, the property of the Railroad Company, as the statutes of Colorado direct, and as they admit and assert that they will do unless restrained.

And because (b), the taxes here involved are collectible for and belong in various proportions to the State of Colorado, the County of Weld, thirteen cities and towns, and fifty-two school districts; under the laws of Colorado, neither the County of Weld nor any

of its officers has any jurisdiction or control over the taxes or funds of any of said cities, towns or school districts; no action at law against the county or any of its officers could avail to recover back any portion of the taxes collected by or on account of any of said cities, towns or school districts; it follows that if payment were made no recovery back could be had except by a great multiplicity of suits.

9. The Circuit Court of Appeals held (222 Fed. 654) that even though jurisdiction of the Federal court of equity be invoked upon ancient and well-recognized grounds, it will be ousted by a state statute giving a remedy at law, unless such remedy at law is available only in a state court. In this we respectfully submit the learned court below erred and its decision is in conflict with prior decisions of this Court cited in preceding paragraphs 5 and 6. Moreover, while the amount of said taxes payable to said thirteen cities and towns and fifty-two school districts is in the aggregate large, the amount payable to and recoverable from each of them is in most instances too small to be within the jurisdiction of the Federal courts.

10. The Circuit Court of Appeals held that the statute of the State of Colorado (Revised Statutes 1908, page 1357, sec. 5750) afforded a complete remedy, which was exclusive in character and ousted jurisdiction in equity even of the Federal courts. In this, as we respectfully submit, the learned court below erred. The statute relates only to state taxes, or at the most to state and county taxes, and not at all to taxes of cities, towns and school districts. It makes no provision for payment under protest, holding in a separate fund, or suit to recover back, but

simply authorizes the County Commissioners to make refund under certain circumstances and take credit with the state for so doing. The County Commissioners have been deprived of this power by a later enactment, effective prior to the beginning of this action (Colorado Session Laws 1913, pages 527, 528, 534, particularly sec. 5, page 528). It follows that no right of action against them or against the county, enforceable in a suit at law, arises from their failure to make such a refund. It follows also that under no circumstances can any cause of action arise against the county or the Board of County Commissioners for the recovery back of the taxes of the cities, towns and school districts. With these taxes neither the county nor the County Commissioners have any connection or concern. They are totally without power to make refund thereof, and are prohibited by the constitution of the state from interfering in any manner with the fiscal affairs of these minor municipal corporations.

11. The Circuit Court of Appeals construed the Colorado statute as one which excludes the right to resort to equity and substitutes a remedy at law. Said statute has never been so construed by the courts of Colorado. On the contrary, by a long series of decisions, the state courts have consistently and continuously held that the statute does not exclude the right to resort to equity, but that equity has jurisdiction, and will afford relief whenever appealed to upon any of the ancient and well-recognized grounds, such as appear in the case here under consideration. A recent instance of this line of decisions is found in Bimetallic Investment Co. v. State Board of Equalization, 56 Colo., 512 (see also 56 Colo., 343), in

which the decision of the Supreme Court of Colorado was affirmed by this Court on December 20, 1915. (Bimetallic Investment Co. v. State Board of Equalization, 239 U. S., 441. The question of jurisdiction in equity and adequate remedy at law under the Colorado statute here involved was presented to and considered by this Court, as appears from its opinion.

12. The Circuit Court of Appeals held that an adequate remedy at law which would oust the jurisdiction of equity would be afforded by an action or actions to recover back the taxes after payment. But in this, as we respectfully submit, the learned court below erred, because a county is under no obligation and has no power to refund money theretofore paid to a city, a town or a school district, because no suit can be maintained for the recovery of such money and no judgment had therefor; and because the constitution of Colorado prohibits a County from being or becoming in any manner responsible for any debt or obligation of a city, a town, a school district, or other municipal corporation.

Even though such judgments were obtained, it would be impossible to enforce their collection, because no machinery is provided by which, nor have the courts any authority, to enforce such payments.

Even though judgments were obtained and payments could be enforced, the Railroad Company could never recover back all that it had paid, but must in any event lose a substantial part thereof, for the reason that under the laws of Colorado the only method by which funds could be raised for the payment of such an obligation would be by taxation, which must rest equally and uniformly upon all of the property

within the jurisdiction of the authority levying the tax; the property of the Railroad Company is permanently situated in each of these taxing districts, and it is a very large taxpayer therein, being the largest single taxpayer in Weld County, and in some of the school districts paying more than one-half of the total tax collected; it follows that the money with which to make the refund must inevitably be paid by the Railroad Company itself or be realized from its property, which renders it impossible to procure anything like complete reimbursement.

Further than that, the heavy expense incident to efforts to collect, costs of litigation, attorneys' fees, interest on the money, and other like items, would be irretrievably lost.

13. The decision of the Circuit Court of Appeals construing and expounding the decision of this Honorable Court in Singer Sewing Machine Co. v. Benedict, supra, has of course become the law of the Eighth Circuit, although, as we respectfully submit, it is erroneous. As a result, it is now impossible to procure injunctive relief against invalid taxes in any Federal court in that circuit, for in nearly, if not quite, all of the states comprising said circuit the right exists to pay a disputed tax and subsequently recover it back in an action at law if in fact it is illegal. Many suits in equity pending at the time of the decision of the Circuit Court of Appeals, and in which preliminary injunctive relief had been granted, have since said decision, and in attempted compliance therewith, been dismissed, although equity jurisdiction was invoked upon ancient and well-settled grounds. In all suits of like character instituted

since the decision of the Circuit Court of Appeals, relief has been denied. This marks a complete reversal of the situation as it theretofore existed and of the law as it was theretofore at all times understood in the courts of the Eighth Circuit. If in fact, and as we most earnestly contend, the learned Circuit Court of Appeals has given a wrong construction and too broad an application to the decision of this Honorable Court in Singer Sewing Machine Co. v. Benedict, then, as we respectfully but most earnestly represent, it is of the utmost importance that this Honorable Court now assume jurisdiction of the cause for the purpose of correcting the error and advising the courts of the Eighth Circuit in a definite and conclusive way what are the precise scope and limits of its prior decision in Singer Sewing Machine Co. v. Benedict.

14. By section 129 of the Judicial Code, the petitioner herein is entitled as of right to a review of the order of the learned trial court denying its application for the preliminary injunction. This it has never had insofar as the merit of the application is concerned. If the learned Circuit Court of Appeals was in error in holding that equity was without jurisdiction of the cause, petitioner can never have such review, and its statutory right thereto will be totally denied, unless this Court now assumes jurisdiction of the cause.

15. Inasmuch as the Circuit Court of Appeals has determined a question which necessarily finally disposes of the cause and requires the dismissal of the bill, petitioner can never have any review by this

Court of said determination unless it is had now, either upon the pending appeal or by certiorari.

Metropolitan Water Co. v. Kaw Valley Drainage District, 223 U. S., 519.

Brown v. Alton Water Co., 222 U. S., 325.

In view of the general importance and widespread effect of the decision, as well as the very serious prejudice which petitioner suffers therefrom, we respectfully submit and most earnestly request that the writ of certiorari should be now issued if for any reason the Court concludes that it has not jurisdiction upon the appeal.

16. Even though theoretically the petitioner could by subsequent appeal after final decree in the trial court bring the cause to this Court for review, such right would avail nothing. Unless preliminary injunctive relief be had, final relief would be nugatory. The bill alleges, and the answer admits and asserts, that unless restrained by order of court the collecting officers will forthwith proceed to collect the disputed taxes, by distraint and sale and by the other drastic methods provided and enjoined by the Colorado statutes. It follows that unless preliminary injunction be issued, the disputed taxes would be collected in full and the case would become moot long before final decree. Up to this time collection has been prevented by a restraining order in aid of the pending appeal.

17. At the hearing in the trial court upon application for the preliminary injunction, the allegations of the bill relative to the invalidity of the tax, the

existence of the discrimination complained of and to the extent claimed, and that said discrimination was systematic, continuous, intentional and fraudulent, as well as all other allegations of substance in the bill, were amply sustained by the proof, as the record now before this Court will demonstrate.

Wherefore, petitioner prays this Honorable Court to issue its writ of certiorari, directed to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, directing said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and all proceedings in said court in said cause hereinabove mentioned, to the end that said cause may be reviewed and determined by this Honorable Court, and that the decree of the Circuit Court of Appeals therein may be reviewed and revised by this Honorable Court, and for such other, further and different relief as to the Court may seem meet and just, and your petitioner will ever pray.

M. H. Loomis

C. C. Dorsey

.....

Solicitors for Petitioner.

United States of America, District and State of Colorado, City and County of Denver, ss.

CLAYTON C. DORSEY, being first duly sworn, on his oath says:

That he is General Attorney for Union Pacific Railroad Company, the petitioner above named, and one of its solicitors in this cause; that he has read the foregoing petition and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters and things therein stated upon information and belief, and as to those he believes it to be true; that he makes this verification on behalf of said petitioner for the reason that said petitioner is a corporation. Clayton C. Dorsey

Subscribed and sworn to before me this 14th day of January, A. D. 1916.

My commission expires October 24, 1918

Seal

Walter E. Wilmot

Notary Public.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

No. 431.

UNION PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO; W. R. PATTERSON, AS COUNTY TREASURER OF SAID COUNTY; AND S. J. McAFEE, AS SHERIFF OF SAID COUNTY, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

ANALYSIS OF THE OPINIONS OF CIRCUIT COURT OF APPEALS.

(217 Fed., 540; 222 Fed., 651.)

The court holds that equity is without jurisdiction of this cause. Having arrived at that conclu-

sion, the court expressly declines to consider or determine the validity of the tax. Plainly, equity jurisdiction would have been renounced even though the court had distinctly held that the tax was entirely invalid. We are, therefore, justified in approaching the subject and analyzing the opinion upon the assumption and from the point of view that the tax is in fact invalid.

The court's conclusion is arrived at from the following process of reasoning:

1. That a statute of the State of Colorado authorizes the payment of all the taxes of every nature which are claimed to be invalid, and the recovery back in one action at law of all of the moneys so paid.

2. That such a state statute, by implication, prohibits resort to equity and the issue of an injunction.

3. That such a state statute is effectual in a federal court of equity, annuls its power to issue an injunction against the collection of such tax, and destroys the equity jurisdiction of the federal court, even though that jurisdiction be founded upon an ancient and well-settled ground, such as the removal of a cloud upon the title to real estate, or other like matter.

The court's decision is tantamount to the declaration that in the State of Colorado, as well as in every other state having a statute similar to that of Colorado, as the same is construed by the court, no case involving relief from an invalid tax can be entertained by a court of equity, and that under no imaginable set of circumstances can an injunction be issued to prohibit the collection of such an invalid tax.

That a federal court of equity can be so stripped of its authority, its ancient jurisdiction so limited, and its power to relieve injured suitors, who, by reason of diversity of citizenship or other causes recognized by the law of the nation, have a right to litigate in the national courts, so utterly destroyed, and that all this can be done by a statute of a state, is a doctrine so novel in its conception, so startling in its nature, so revolutionary in its results, as at once to challenge the most serious attention.

If its effect were confined to the case at bar, the result of the decision, if it be wrong, would be sufficiently harmful to demand the most conscientious reconsideration of the question as to whether it be right. But its effect is not confined to this case. The decision, if adhered to, will revolutionize the practice. It enunciates a doctrine which has never before prevailed in the state courts of Colorado, or in the federal courts sitting in Colorado, or in any federal court in the Eighth Circuit, or, so far as a most careful investigation has disclosed, in any federal court in any part of the United States, including the Circuit Court of Appeals of this circuit and the Supreme Court of the United States. On the contrary, the rule heretofore steadily adhered to by all of these courts has been that, in spite of such a state statute, whenever a case stood within any of the recognized heads of equity jurisdiction, such as removal of clouds from title to real estate, or other like ground, or whenever, even in the absence of this, the suitor had not some other plain, certain, and indubitable remedy whereby he could obtain full, complete, adequate, and speedy relief, equity would take jurisdiction and

enjoin the collection of an invalid tax imposed by authority of the state.

Upon this principle, equitable and injunctive relief has been repeatedly administered in such cases by the state courts of Colorado, including the Supreme Court of the state. Such relief in such cases has likewise been repeatedly administered by the federal courts sitting in Colorado, and the propriety of such action affirmed by the appellate court. Such relief in such cases, under like circumstances, has likewise been administered by the federal courts sitting in the various other states constituting the Eighth Circuit, and its propriety affirmed. And such relief in such cases, under like circumstances, has been repeatedly administered by the federal courts in the other judicial circuits, and its propriety affirmed by their respective courts of appeals and by the Supreme Court of the United States.

There are now pending in the District Court of the United States for the District of Colorado, on the equity side thereof, a number of cases involving alleged illegal taxes to a very large amount and presenting the same question which has been here determined.

There are now pending in various trial courts of the State of Colorado a considerable number of such cases.

There has just been decided by the Supreme Court of the United States a suit in equity of like character, whereof jurisdiction in equity was entertained and injunctive relief administered by the state District Court for the City and County of Denver, wherein such equity jurisdiction was unquestioned by

the Supreme Court of the state, and wherein the matters decided by the Supreme Court of the United States relate solely to the validity of the tax, jurisdiction in equity being regarded as indubitable.

Bi-Metallic Inv. Co. vs. State Board, 239 U. S., 441. Decided Dec. 20, 1915.

This opinion, if adhered to, will, of course, conclude the present litigation, requiring the plaintiff to pay an illegal tax, amounting now to nearly forty thousand dollars, or suffer wrongs which it is the special province of equity to relieve from, and thereafter enter upon a hopeless struggle to get back what it can, with the certainty that all of it can never be recovered, with the great probability that none of it can ever be recovered, and with, to say the least, the greatest doubt as to what the courts of Colorado, which alone can conclusively determine the meaning and effect of the numerous conflicting and ambiguous provisions of the state statutes and Constitution involved, will ultimately decide. We think the remedy to which we are remitted is non-existent. Nevertheless, if the present opinion stands, we must attempt to avail ourselves of that supposed remedy, which is theoretical only, which may not exist at all, and which, at best, is experimental, hitherto untried and uncharted, and certainly beset with the greatest doubts and difficulties.

If the doctrine of the present decision be followed in the other litigation mentioned, enormous injustice will be done to numerous other litigants, who have up to this time followed the course prescribed by all previous decisions.

Moreover, if the present decision be correct, then all of the numerous injunctions heretofore issued in Colorado, both by state and federal courts, to restrain the collection of illegal taxes, have been wrongfully issued.

It seems to us that these considerations justify and require a petition for certiorari. With the utmost respect, we venture to assert that they also justify and demand a reconsideration by this court of the questions which, we earnestly contend, have now been wrongly decided.

In the discussion which follows, the first opinion of the Circuit Court of Appeals (217 Fed., 540) is chiefly referred to. This is so because in that opinion the court set forth its reasons for its decision. In the opinion on rehearing (222 Fed., 651) these were not modified or materially amplified. It is significant, however, that upon rehearing (222 Fed., page 659) one of the judges expressed grave doubt of the correctness of the decision.

II.

THE STATUTORY REMEDY, IF ANY, IS NOT AND CANNOT BE EXCLUSIVE. THE SUPREME COURT OF THE UNITED STATES HAS REPEATEDLY DECLARED THAT NO STATUTE OF A STATE CAN CONTROL, CONTRACT, CONDITION, OR IN ANY MANNER LIMIT THE EQUITY JURISDICTION OF FEDERAL COURTS, AND THAT THE REMEDY AFFORDED BY SUCH A STATUTE, NO MATTER HOW ADEQUATE OR COMPLETE, CANNOT OUST THE JURISDICTION OF A FEDERAL COURT OF EQUITY. THE PRESENT OPINION IS IN CONFLICT WITH THESE DECISIONS.

After quoting a portion of the Colorado statute, the court says (217 Fed., 541):

> "Following the decision of the Supreme Court in Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481, the trial court held that this statute affords a complete *and exclusive remedy* for the wrongs here complained of." (Italics ours.)

As to the assertion inferentially but necessarily involved in the foregoing quotation from ~~this~~ the court's opinion—namely, that the Supreme Court in the Singer Sewing Machine case had held the statutory remedy to be exclusive—it is only necessary to quote from the Supreme Court's opinion, as follows (229 U. S., 486, 487):

> "We refer to these cases (Colorado cases dealing with the statute in question) not as defining the jurisdiction in equity of the Circuit Court, *for that they could not do.* (Payne vs. Hook, 7 Wall. 425, 430; Whitehead vs. Shattuck, 138 U. S. 146; Smythe vs. Ames, 169 U. S. 466, 516.) * * * Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, *unless there be special circumstances showing the contrary.*" (Citing cases.) (Italics ours.)

But the Circuit Court of Appeals, speaking of the statute in question, says (217 Fed., 544):

> "It was not intended to be cumulative. Its object was to give an action at law for the recovery of sums paid on account of invalid taxes, *in place of a suit in equity to restrain their collection.* Under such circumstances it does not lie with the courts to say that the remedy which the legislature has provided is inadequate, and that the remedy which it has condemned shall, therefore, be continued. This would be to make the law of no effect through the traditions of equity. It would not only be judicial legislation, but would nullify a statute which is conceded to be constitutional. It is a mistake to view this statute as relating to procedure only. It creates a right in favor of the aggrieved taxpayer and, from considerations of the highest public policy, *abolishes the right to*

> *stay the collection of public revenues by injunction.* The courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the one which it takes away. The statute being constitutional, *the judgment of the legislature on that subject must control.*" (Italics ours.)

There is no uncertainty about this language. The court asserts with the utmost clearness that the statute amounts to a prohibition of the remedy by injunction, because it "abolishes the right to stay the collection of public revenues by injunction," and because against invalid taxes it provides a remedy, "in place of a suit in equity to restrain their collection." The court asserts with equal clearness that the statutory remedy is exclusive, and in all cases destroys jurisdiction in equity in the federal as well as in the state courts, precluding even an inquiry as to the adequacy of the remedy afforded by the statute. The court expressly holds that it does not "lie with the courts to say that the remedy which the legislature has provided is inadequate, and that the remedy which it has condemned should, therefore, be continued," and again expressly holds that to permit the federal court of equity to consider and pass upon the adequacy of the statutory remedy "would be to make the law of no effect through the traditions of equity," and that "it would not only be judicial legislation, but would nullify a statute which is conceded to be constitutional," and that "the courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the one which it takes away," and that

"the judgment of the legislature on that subject must control."

We respectfully submit that this is new and startling doctrine. From the foundation of the federal judicial system until the court spoke in the present case, it had been held by an unruffled current of authority, including repeated decisions of the Supreme Court of the United States, that equity jurisdiction of the federal courts was to be determined in accordance with the general principles of equity as the same existed in 1789, at the time of the adoption of the first judiciary act; that if, in accordance with the guiding rules then recognized, a case fell within the scope of equity jurisdiction, no state statute, not even one which expressly prohibited resort to equity, and no remedy at law afforded or authorized by state statute or state decisions, however adequate and complete, could in any manner or to any extent whatever control, contract, condition, or limit the equity jurisdiction of the federal courts; and that, notwithstanding such state statute or state-given remedy, it was not only the privilege but the duty of the federal courts of equity to assume and retain jurisdiction and administer equitable relief in all cases justified by "the traditions of equity" (to borrow the court's phrase), to the same extent and with the same freedom as though the state statute or the state-given remedy did not exist at all.

The court holds that the federal court of equity is precluded from considering the adequacy of the state-given remedy, because it may not review the judgment of the state legislature, and that it is ousted of its jurisdiction because the state statute exists. We re-

spectfully submit that exactly the opposite is true. The federal court of equity need not and should not consider the adequacy of the state statutory remedy, because, however adequate and complete it may be, it cannot limit or affect federal equity jurisdiction; and the federal court of equity is not and could not be ousted of its jurisdiction by the state statute, because no state statute, whatever be its terms, can in any respect or to any degree limit, affect, or control such federal equity jurisdiction.

The court's opinion in the instant case, far from being supported by the decision of the Supreme Court in the Singer Sewing Machine case, is in direct conflict therewith. In that case the Supreme Court, after quoting a portion of the Colorado statute and referring to some of the Colorado cases in which it had been mentioned, said (229 U. S., 486):

> "We refer to these cases not as defining the jurisdiction in equity of the Circuit Court, *for that they could not do.* (Payne vs. Hook, 7 Wall. 425, 430; Whitehead vs. Shattuck, 138 U. S. 146; Smythe vs. Ames, 169 U. S. 466, 516.)" (Italics ours.)

In Payne vs. Hook, 7 Wall., 425, 430 (cited in the Singer case) the Supreme Court said:

> "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states could not be impaired by the laws of states, which prescribe the modes of redress in their courts, or which regulate the

> distribution of their judicial powers.' If legal remedies are sometimes modified to suit the changes in the laws of states and the practice of their courts, it is not so with equitable. *The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union.*" (Citing many cases.) (Italics ours.)

In Smythe vs. Ames, 169 U. S., 466, 516 (cited in the Singer case), in response to the objection that the federal court of equity was without jurisdiction because a remedy at law had been provided by a state statute, the Supreme Court said:

> "We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court *is not to be conclusively determined by the statutes of the particular state in which suit may be brought.* One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court. And he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. * * * But if the case in its

essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of federal jurisdiction. Payne vs. Hook, 7 Wall. 425, 430; McConihay vs. Wright, 121 U. S. 201, 205." (Italics ours.)

In McConihay vs. Wright, 121 U. S., 201, 205 (cited in Smythe vs. Ames, *supra*), objection was made to a bill to quiet title because by a statute of West Virginia an adequate remedy at law was provided in such case, in the form of an action in ejectment. This objection was overruled, the court saying:

"The contention of appellants, however, is that by the statute of West Virginia the complainant might have maintained an action of ejectment. Reference is made in support of this contention to the West Virginia Code of 1868, c. 90, to show that an action of ejectment in that state will lie against one claiming title to or interest in lands, although not in possession. Admitting this to be so, it nevertheless cannot have the effect to oust the jurisdiction in equity of courts of the United States as previously established. That jurisdiction, as has often been decided, is vested, as a part of the judicial powers of the United States, in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of

Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. *Bills quia timet, such as the present, belong to the ancient jurisdiction in equity, and no change in state legislation giving, in like cases, a remedy by action at law, can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress.*" (Italics ours.)

In Mississippi Mills vs. Cohn, 150 U. S., 202, it appeared that the Circuit Court had denied jurisdiction in equity because by a statute of the State of Louisiana an adequate remedy at law had been afforded. The Supreme Court reversed this decision, citing and quoting from Payne vs. Hook, *supra*, and McConihay vs. Wright, *supra*, and holding, as stated in the syllabus:

"The jurisdiction of federal courts sitting as courts of equity cannot be enlarged or diminished by state legislation.

Whether such a court has jurisdiction in equity over a particular case will be determined by inquiring whether, by the principles of common law and equity, as distinguished and defined in this country and in the mother country at the time of the adoption of the Constitution of the United States,

the relief sought in the bill was one obtainable in a court of law, or one which only a court of equity was fully competent to give."

In Borer vs. Chapman, 119 U. S., 587, 600, the court says:

"It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests in administration suits, and in creditors' bills brought against executors or administrators, or after distribution against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to the payments of his debts. As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal courts, to be administered by the circuit courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, *and cannot be affected by any legislation except that of the United States.*" (Citing many cases.) (Italics ours.)

In Kirby vs. Lake Shore & Michigan Southern R. R., 120 U. S., 130, 137, the court says:

"While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common

> law, the laws of the several states, except where the Constitution, laws, treaties and statutes of the United States otherwise provide, *their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit.* In United States vs. Howland, 4 Wheat. 108, 115, Chief Justice Marshall, speaking for the court, said, that, as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in all the states. The same view was expressed by Mr. Justice Curtis in his work on the jurisdiction of the courts in the United States (p. 13), when he observed that 'the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States *without regard to state laws.*'" (Italics ours.)

In Ridings vs. Johnson, 128 U. S., 212, objection was made to jurisdiction in equity because an adequate remedy at law had been provided by a state statute of Louisiana. But the court said (p. 217):

> "We have distinctly held that the equitable jurisdiction and remedies confessed by the laws of the United States upon its courts cannot be limited or restrained by state legislation, and are uniform throughout the differ-

> ent states of the Union. Payne vs. Hook, 7 Wall. 425. We think, therefore, that the court erred in dismissing the bill for want of jurisdiction."

The doctrine announced in the foregoing decisions is not modern, occasional, or sporadic. It has been consistently adhered to since the establishment of the national courts, and constantly reiterated and insisted upon, not only in the cases cited above, but in numerous other decisions which might be added to the list.

In United States vs. Howland, 4 Wheat., 108, decided in 1819, objection had been made to a bill in equity because an adequate remedy at law was afforded by a statute of Massachusetts. But the court, speaking through Chief Justice Marshall, said (p. 114):

> "A trust exists, and an account would be proper to ascertain the sum due from Howland and Allen to Shoemaker and Travers. The case, even independent of these circumstances, would be proper for a court of chancery, but for the act of Massachusetts, which allows a creditor to sue the debtor of his debtor. Still, the remedy in chancery, where all parties may be brought before the court, is more complete and adequate, as the sum actually due may be there in such case ascertained with more certainty and facility; *and as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery*

powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states." (Italics ours.)

And the rules enunciated in the foregoing authorities have been emphatically restated and applied in the most recent cases:

Waterman vs. Canal Louisiana Bank, 215 U. S., 33, 43.

McClellan vs. Carland, 217 U. S., 268, 281.

Until the filing of the opinion in the case at bar, the Circuit Court of Appeals has constantly and consistently recognized the binding force of the foregoing authorities and steadily adhered to the rules which they announce.

In National Surety Co. vs. State Bank, 120 Fed., 593, objection was made to the jurisdiction in equity of the Circuit Court because by a statute of Nebraska an adequate remedy at law had been afforded. But the court, speaking through his Honor Judge Sanborn, said (p. 603):

> "Another reason why the proceeding provided by the Code of Nebraska does not oust the jurisdiction in equity of the national circuit court is that, while state legislation may enlarge, it cannot destroy or impair that jurisdiction. The power of circuit courts of the United States to administer rights and remedies in equity was vested in them as a part of the judicial power of the Nation, under the Constitution of the United States and the

> Judiciary Act of 1789; *and as it was not granted by, it may not be revoked, impaired or destroyed by, the act of any state. Unless changed by subsequent acts of Congress, the adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when that jurisdiction was vested—that which was when the act of 1789 was adopted.* McConihay vs. Wright, 121 U. S. 201, 206. As there were no adequate remedies at law for a wrong of the character of that of which the appellants complain in 1789, and as the Congress has since provided none, this case falls within the equitable jurisdiction of the circuit court, and must be there heard, determined and relieved." (Italics ours.)

In Butler Brothers Shoe Co. vs. United States Rubber Co., 156 Fed., 1, the court, speaking through his Honor Judge Sanborn, said (p. 18):

> "But the power of circuit courts of the United States to administer rights and remedies in equity was vested in them as part of the judicial power of the Nation, under the Constitution of the United States and the Judiciary Act of 1789, *and as it was not granted by, it may not be revoked, impaired or destroyed by, the legislation or act of any state.*" (Citing many cases.) (Italics ours.)

In this case certiorari was denied by the Supreme Court of the United States (212 U. S., 577).

In Dunlop vs. Mercer, 156 Fed., 545, 551, the court reiterated the doctrine, again speaking through his Honor Judge Sanborn.

In Spencer vs. Watkins, 169 Fed., 379, objection was made to the jurisdiction in equity of the Circuit Court because by the Constitution and statutes of the State of Minnesota an adequate remedy at law was provided. But the court overruled the objection, holding that no state statute, however specific; no state-given remedy, however adequate, could oust the equity jurisdiction of the federal courts; and, speaking through his Honor Judge Hook, said (p. 381):

> "This must, of necessity, be so. Otherwise the judicial power of the United States, as understood at the adoption of the Constitution, would have no uniform or permanent measure, but would depend upon the varying legislative action of the several states, and as to that founded on diversity of citizenship, the tendency would be towards its extinction by absorption in the exclusive jurisdiction of the local tribunals. The equity jurisdiction conferred by the Constitution upon the courts of the United States is the same as that then possessed by the High Court of Chancery in England in its judicial capacity, as distinguished from the jurisdiction of a political or governmental character which was exercised by the Chancellor as the representative of the Crown. *It is uniform throughout the United States, not differing in one state from that in another, and is subject to neither limitation nor restraint by state legislation.*" (Italics ours.)

In this case certiorari was denied by the Supreme Court of the United States (215 U. S., 605).

In McClellan vs. Carland, 187 Fed., 915, the court, following the direction of the Supreme Court of the United States in McClellan vs. Carland, 217 U. S., 268, 281, instructed Judge Carland, then United States district judge for the District of South Dakota, to entertain and proceed with the hearing upon a certain bill in equity. The Supreme Court had held that the bill was within the equity jurisdiction of the Circuit Court, notwithstanding certain statutory provisions of South Dakota which afforded a different remedy (217 U. S., 271). The Circuit Court of Appeals held likewise, and, speaking through his Honor Judge Sanborn, said (187 Fed., 918):

> "When the owner of property dies, his estate is immediately impressed with a trust for the benefit of his creditors, heirs and legatees. The High Court of Chancery in England had jurisdiction to enforce this trust. The national courts in equity as a part of their original jurisdiction derived from that court have plenary power at the suit of any proper heir, legatee or creditor, to enforce this trust against any occupant, executor, administrator or parties into whose control any part of the trust estate has come." (Citing many cases.) * * * (P. 919) "Moreover, this power of the federal courts to hear, to adjudge and to enforce their adjudications of the claims of alleged heirs, legatees and creditors, citizens of other states, to their shares of an estate under administration in

a state court *may not be impaired or withdrawn by the probate or other laws of a state, since it was not derived from the states.*" (Citing many authorities.) * * *

"As the United States Circuit Court for the District of South Dakota had jurisdiction of the suit of the complainants below, it was its duty to proceed to try and decide it. The McClellans had the constitutional right to the speedy and independent opinion of the judge of the federal court upon the issues they presented, and the fact that the state was litigating, or was about to litigate, in its own courts the same issues constituted no sound reason why a national court should delay to adjudicate them. McClellan vs. Carland, 217 U. S. 278, 281." (Italics ours.)

But the court in the instant case (217 Fed., 546) says that section 723 of the Revised Statutes "means something," and that the present suit was "brought in violation of its provisions," because, as the court holds, a remedy at law had been afforded by the Colorado statute. It is quite true that section 723 does mean something. But what it means is nothing more nor less than what was always prior to its enactment meant by the settled rule of the High Court of Chancery in England relating to its jurisdiction.

In Boyce vs. Grundy, 3 Peters, 210, decided in 1830, the Supreme Court said (p. 215):

"This court has been often called upon to consider the Sixteenth Section of the Judi-

> ciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, *making no alteration whatever in the rules of equity on the subject of legal remedy.*" (Italics ours.)

And in Wehrman vs. Conklin, 155 U. S., 314, the court, more than sixty years later, reiterated this statement, saying (p. 323):

> "Section 723 has never been regarded, however, as anything more than declaratory of the existing law, Boyce vs. Grundy, 3 Peters 210, and, as was said in New York Guaranty Co. vs. Memphis Water Co., 107 U. S. 205, 210, 'was intended to emphasize the rule and to impress it upon the attention of the courts.' *It was not intended to restrict the ancient jurisdiction of courts of equity, or to prohibit their exercise of a concurrent jurisdiction with courts of law, in cases where such concurrent jurisdiction had been previously upheld.*" (Italics ours.)

And the adequate remedy at law mentioned in section 723 as ousting the jurisdiction of equity is one which existed in 1789, at the time of the creation of federal courts of equity, and not one which has since been afforded by a state statute. This is clearly held by the numerous authorities cited and quoted from, and is expressly stated by the Supreme Court in McConibay vs. Wright, 121 U. S., 201, 206, and by

the Court of Appeals in National Surety Co. vs. State Bank, 120 Fed., 593, 603. See also:

Vol. 1, Street's Fed. Eq. Prac., p. 30, secs. 45 and 47.

Simkins Fed. Eq. Suit (2d ed.), pp. 11 and 15.

From the foregoing authorities we deduce the conclusion that if in a given case jurisdiction in equity be invoked, upon a ground which would have upheld such jurisdiction in the High Court of Chancery in England in the year 1789 and prior thereto, a federal court of equity now has jurisdiction thereof which is totally unaffected by any provision whatever of any state statute. Even a state statute expressly prohibiting jurisdiction in equity, and purporting to make the jurisdiction of the law courts exclusive, is unavailing. *A fortiori* is it true that a state statute which does no more than to afford a possible remedy at law, and by implication only, if at all, prohibits resort to equity, is wholly ineffective to limit, control, condition, or contract federal equity jurisdiction. That jurisdiction was not given, and cannot be taken away, or in any manner, directly or indirectly, limited, by the state. A state-given right or remedy at law which did not exist as a legal right or remedy in 1789, although in every respect adequate and complete, does not oust or affect the jurisdiction. Notwithstanding the existence of such a remedy, suitors who, by reason of diversity of citizenship or other statutory cause, may submit their controversies to the national courts, have an absolute right to have them determined on the equity side of those courts, if the

grounds of equity jurisdiction presented are such as would have been recognized in the High Court of Chancery in 1789.

In the case at bar jurisdiction in equity was founded upon a number of well-sustained grounds, any one of which would have been sufficient to support that jurisdiction according to the state of the law as it existed in 1789, and the principles and practices then recognized and applied by the High Court of Chancery and made a permanent part of the equity jurisprudence of all the federal courts in every part of the United States, which remains unchanged to the present day. But in the case at bar the Court of Appeals has held that this ancient and well-settled jurisdiction is ousted by a statute of the State of Colorado, which it is said affords a remedy at law, although that remedy did not exist in 1789, nor for nearly a century thereafter. In so ruling, the court ignored the numerous decisions hereinabove cited and quoted from, and many others, and violated the settled doctrine which they enunciate. The court, without discussion, citation, or mention, overruled its own repeated prior decisions cited above. We respectfully submit, and most earnestly urge, that in so doing the court committed manifest error and deprived petitioner of the right to have its controversy heard and determined in the federal court of equity—a right which is absolute and which is guaranteed by the Constitution and laws of the United States.

McClellan vs. Carland, 217 U. S., 268, 281.

Chicot County vs. Sherwood, 148 U. S., 529, 534.

McClellan vs. Carland, 187 Fed., 915, 919.

The foregoing rules are of general application. They apply to litigation involving alleged illegal and invalid taxes to the same extent and with the same force as to litigation of other kinds. If the Circuit Court of Appeals be right in the conclusions announced in its opinion, then the federal court sitting in Colorado has jurisdiction of a bill in equity to remove a cloud from title, and to enforce and administer other equitable rights and remedies, in all cases except where such cloud, or right or remedy, arises from, is created by, or is invoked as to illegal and invalid taxation; and in the latter case it has not such jurisdiction. If the court be right in its present conclusions, then the federal court sitting in Colorado has not jurisdiction to remove a cloud upon title or to afford other equitable relief where invalid taxes are involved, but in all other states where no statute exists, such as the Circuit Court of Appeals has construed the Colorado statute to be, the federal court of equity possesses such jurisdiction. This means that federal equity jurisdiction varies with the subject involved, is one thing in one state, and something different in another; that the power and jurisdiction of the federal court of equity change with the geographical location of the place of its sitting, and that state statutes shall be permitted to amend, repeal, and supersede the federal Constitution and acts of Congress. But this does violence to the rule announced by Chief Justice Marshall in 1819 (United States vs. Howland, 4 Wheat., 108, 114), repeatedly reiterated thereafter by the Supreme Court, and asserted time and again by the Circuit Court of Appeals of the Eighth Circuit itself: That federal equity jurisdiction "is uniform throughout the United

States, not differing in one state from that of another, and is subject to neither limitation nor restraint by state legislation."

Spencer vs. Watkins, 169 Fed., 379, 381.

The principle has been repeatedly applied in litigation involving invalid taxes, and authorities involving such application will be cited in the section of this brief which immediately follows.

III.

BOTH THE SUPREME COURT AND THE CIRCUIT COURT OF APPEALS HAVE REPEATEDLY HELD THAT A FEDERAL COURT OF EQUITY WILL RELIEVE AGAINST ILLEGAL AND INVALID TAXES AND ENJOIN THE COLLECTION THEREOF, WHENEVER EQUITY JURISDICTION IS INVOKED UPON A GROUND WHICH, ACCORDING TO THE RULES AND PRINCIPLES RECOGNIZED AND APPLIED BY THE HIGH COURT OF CHANCERY IN 1789 WOULD HAVE SUPPORTED SUCH JURISDICTION, NOTWITHSTANDING THE FACT THAT BY A STATE STATUTE A MOST COMPLETE, COMPREHENSIVE, AND IN EVERY WAY ADEQUATE REMEDY AT LAW MAY HAVE BEEN AFFORDED. THE OPINION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THESE DECISIONS.

Immediately following that portion of the opinion quoted in the last preceding section of this brief,

the court says (217 Fed., 544), referring to the statute of Colorado:

> "Such statutes have been frequently before the Supreme Court, and have been uniformly held to afford a plain, speedy and adequate remedy, *such as excludes the right to resort to equity.* Tennessee vs. Sneed, 96 U. S. 69; Shelton vs. Platt, 139 U. S. 597; Indiana Manufacturing Co. vs. Koehne, 188 U. S. 681; Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481." (Italics ours.)

With the utmost respect, but with the greatest earnestness, we urge that the foregoing statement in the opinion is not only unsupported by the authorities cited, and finds no sanction in any case which a most diligent search has revealed, but, on the contrary, is directly opposed to every decision of the Supreme Court, and of the Circuit Court of Appeals, including those cited in its support. The true rules are these:

1. If equity jurisdiction be invoked upon one of the ancient and recognized grounds, the federal court of equity must entertain the suit, no matter how adequate and complete a remedy may be afforded by the statutes of the state.

2. If in a given suit none of the ancient and recognized grounds of equity jurisdiction appear, nevertheless the federal court of equity must and will take jurisdiction if it is made to appear that under the statutes of the state no adequate means is provided for the recovery back after payment of moneys illegally exacted for taxes, because theoretically every

wrong must have a remedy, and if such a remedy does not exist at law, it must be afforded by equity.

3. But, if in a given suit none of the ancient and recognized grounds of equity jurisdiction appear, and it also appears that by a statute of the state, or by the decisions of the state courts, money illegally exacted for taxation may be recovered back, and that the remedy thus provided is clearly adequate, then the federal court of equity will not assume jurisdiction.

The foregoing rules are but corollaries of the guiding principle clearly enunciated in the many cases cited in the preceding section of this brief. An analysis of the decisions relating to matters of taxation demonstrates their correctness.

The cases cited by the court in the foregoing extract from its opinion arose in the States of Tennessee, Indiana, and Colorado, respectively. In the discussion which follows, these and other cases are classified with regard to the states in which they arose, so that the various provisions of the state statutes may be emphasized and clearly understood.

Tennessee.

By the statute of Tennessee express provision was made for the payment under protest of disputed taxes; for the retention of such money in a special fund until an action at law for its recovery could be brought and determined; for the prompt bringing of such action at law, and the prompt repayment of the money in case plaintiff succeeded; and the statute

expressly made this remedy exclusive of all others, expressly prohibited resort to equity, and, in terms, forbade the issuance of any injunction or other writ to prevent, hinder, or delay the collection of any tax. (96 U. S., pp. 71, 72.) It will be seen that this statute is much more definite, comprehensive, and complete than that of Colorado, and certainly affords a plain, speedy, and adequate remedy at law.

In Tennessee vs. Sneed, 96 U. S., 69 (cited by the Circuit Court of Appeals), no question of federal equity jurisdiction was involved. The case reached the Supreme Court of the United States on writ of error to the Supreme Court of the State of Tennessee. The relator had tendered in payment of the tax certain funds, including bills of the Bank of Tennessee, which he averred had been by a previous law of the state made legal tender and receivable in payment of taxes. This tender had been refused by the tax-collecting officer, and the relator, bringing his suit in the state court of said state, sought a writ of mandamus directing the collecting officer to receive said funds in payment. The state court denied the writ, which denial was affirmed by the Supreme Court of the state, and a writ of error sued out from the Supreme Court of the United States. Of course, no question was or could be involved as to the effect of the Tennessee statute, referred to above, upon the equity jurisdiction of the federal courts. Beyond doubt, such a statute controls the state courts. No question of federal power is in such a case presented, unless the state statute be in conflict with the federal Constitution, and such was the sole question presented to the Supreme Court in Tennessee vs. Sneed. The relator contended that

the contract made by the provisions of the bank charter, to the effect that bills of the Bank of Tennessee should be receivable in payment of taxes, was impaired by the subsequent statute of Tennessee providing that the sole remedy should be by payment of the tax and suit to recover it back. The question presented is thus stated by the Supreme Court of the United States (96 U. S., 73):

> "It is said that the acts of 1873, to which reference is made, are laws impairing the obligation of the contract contained in the Twelfth Section of the Bank Charter. This is done, it is said, not by a direct infraction of the obligation, but by placing such impediments and obstructions in the way of its enforcement, by so impairing the remedies, as practically to render the obligation of no value. *This is the only point in the case involving a question of federal jurisprudence, and the only one that it is necessary for us to consider.*" (Italics ours.)

Thereupon the court proceeds to consider this one question, and arrives at the conclusion that the remedy afforded by the legislation of 1873 does not place such impediments and obstructions in the way of the enforcement of the alleged contract, or so impair the remedies thereon which existed at the time it was made, as to render the obligation of no value, and therefore that the obligation of the contract was not impaired in the sense of the federal Constitution. But this is very far from holding that the Tennessee statute "affords a plain, speedy and adequate remedy,

such as excludes the right to resort to equity" in a case otherwise within the equity jurisdiction of the federal courts, as the Circuit Court of Appeals says it does.

Shelton vs. Platt, 139 U. S., 591, and Allen vs. Pullman's Palace Car Co., 139 U. S., 658 (both cited by the court), arose in the State of Tennessee, and were decided in 1891. They were suits in equity, brought on behalf of the United States Express Company and Pullman's Palace Car Company, respectively, to enjoin the collection of a tax alleged to be illegal. In neither case was there either allegation or proof of any ground of equitable jurisdiction upon which a like bill would have been entertained by the High Court of Chancery, according to the principles and practices recognized and applied in 1789. On the contrary, the sole charge in either case was that the tax was illegal and void, because, as was alleged, the statute under which it was imposed was unconstitutional. There was no question of cloud on title, for no real estate was involved. There was no question of systematic under- or over-valuation, of repeated trespasses, of multiplicity of suits, of complicated issues and involved and difficult problems, involving procedure in the nature of accounting, or of any of the numerous grounds alleged and clearly shown to exist in the case at bar, upon which, according to the ancient and well-settled doctrine, equity jurisdiction may be invoked and should be exercised. Under these circumstances, in view of the statute of the State of Tennessee referred to above, the Supreme Court held that equity was without jurisdiction to enjoin the collection of the tax. But a reading of the opinions,

particularly that in Shelton vs. Platt, makes it clear beyond peradventure of doubt that if any of the ancient and settled grounds of equity jurisdiction had existed, the ruling would have been otherwise. In the Shelton case the court concludes its opinion (139 U. S., 600) with these words:

> "And while an unconstitutional tax may, in the language of the learned judge holding the circuit court, confer no right, impose no duty, and support no obligation, it will be perceived that, in our view, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction, where irreparable injury *or other ground for equitable interposition is not shown to exist.*" (Italics ours.)

That this is what the court meant to hold is made clear by its subsequent opinion in Pacific Express Co. vs. Seibert, 142 U. S., 339, wherein, at page 348, Shelton vs. Platt, *supra,* and Allen vs. Pullman's Palace Car Co., *supra,* are reviewed; the court saying:

> "But, when the illegality of the tax, or the invalidity or unconstitutionality of the legislative act under which it is imposed, is established, it becomes necessary to go further and make out a case that can be brought under some recognized head of equity jurisdiction; such as, that the collection of the tax sought to be restrained may entail a multiplicity of suits; or cause some other

> irreparable injury, as, for instance, the ruin of complainant's business; or, where the property is real estate, throw a cloud upon the title of complainant. Shelton vs. Platt, 139 U. S. 591, 594; Allen vs. Pullman's Palace Car Co., 139 U. S. 658, 661."

But in Taylor vs. Louisville & Nashville R. R. Co. (C. C. A., 6th Cir.), 88 Fed., 350, decided in 1898, the question was expressly determined. That suit arose in Tennessee, and was a suit in equity in the federal court to enjoin the collection of a tax. Jurisdiction in equity was invoked upon the ground (p. 358) that the alleged illegal tax constituted a lien, and therefore a cloud upon the title to complainant's real estate, which equity should remove. But the statute of the State of Tennessee, referred to above, was relied upon by the defendant as affording an adequate remedy at law and ousting the jurisdiction of equity. The court, consisting of Circuit Judges Taft and Lurton and District Judge Severens, overruled this contention, and, speaking through his Honor Judge Taft, said (p. 357):

> "The law of the United States forbidding injunctions in federal revenue cases prevents the issuing of an injunction by any court, whether federal or state, because the Constitution and laws of the United States passed in pursuance thereof are the supreme law of the land. The law of Tennessee, however, affects only the jurisdiction of its own courts of equity. It does not restrict or diminish the powers or jurisdiction of the federal

courts of equity, because only an act of Congress can do that." (Citing authorities.) "Hence it follows that if the controversy at bar is one over which the circuit court of the United States, sitting in equity, from which this appeal has been taken, has jurisdiction by virtue of the Constitution and laws of the United States, and according to the general principles governing equity jurisdiction, its power to issue an injunction against state officers is not restricted by a state statute, which only applies, and can only apply, to injunctions issued out of the state courts. * * *"

(P. 358) "Another ground for equitable relief is that the excessive tax, if not paid, will be a cloud upon the title of the complainant for the taxes assessed are a lien upon its property in Tennessee. The tax is not void, and the alleged illegal excess does not appear upon the record. It creates such an apparently valid incumbrance that a court of equity will interfere to remove it as a cloud, if, in fact, it is illegal. Ogden City vs. Armstrong, 168 U. S. 224, 238."

Certiorari to review the foregoing decision was denied by the Supreme Court of the United States (172 U. S., 647).

It was expressly approved in Johnson vs. Wells Fargo & Co., 239 U. S., 234, 244.

We therefore respectfully submit that, in spite of the complete and comprehensive provisions of the

Tennessee statute, affording a remedy far more adequate and certain than that of Colorado, nevertheless the Supreme Court of the United States has distinctly and unequivocally held that such statute cannot avail to oust the equity jurisdiction of a federal court, if founded upon any of the recognized grounds of such jurisdiction, such as the removal or prevention of cloud upon title to real estate. It therefore plainly appears that Tennessee vs. Sneed, *supra;* Shelton vs. Platt, *supra,* and Allen vs. Pullman Co., *supra,* cited by the Circuit Court of Appeals, in no manner support the court's statement that such statutes have by the Supreme Court "been uniformly held to afford a plain, speedy and adequate remedy, such as excludes the right to resort to equity."

Indiana.

In Indiana Manufacturing Co. vs. Koehne, 188 U. S., 681, the state statute involved, as construed by the courts of Indiana, beyond doubt afforded a plain, speedy, and adequate remedy at law. It was immeasurably more comprehensive, definite, and reliable than the Colorado statute here involved. In Indiana Manufacturing Co. vs. Koehne, *supra,* the taxes involved had been assessed upon the capital stock of the corporation, and therefore upon certain letters patent of the United States for inventions which the corporation owned. It was alleged that the tax was to this extent void and the statute authorizing it unconstitutional, because letters patent issued by the United States for inventions are not subject to state taxation.

The company filed its bill in the federal court, seeking an injunction to restrain the collection of the tax. The court says (p. 684):

> "The foundation of this appeal to equity, as averred by complainant, was (1) on the ground that the assessment constitutes a cloud upon title; (2) that there is no adequate remedy at law; (3) that a multiplicity of suits is avoided, and (4) that it prevents irreparable injury to complainant. It has long been the settled doctrine of the federal courts that the mere illegality of a tax, or the mere fact that a law upon which a tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear that the party has no adequate remedy by the ordinary processes of the law, *or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc.*"

It will be observed that the disjunctive "or" is used, which is tantamount to an express holding that, even if an adequate remedy by the ordinary process of the law does exist, nevertheless the federal court of chancery will, and must, retain jurisdiction, if the case falls under some other recognized head of equity jurisdiction.

The court (p. 684) then takes up and discusses the four grounds of equity jurisdiction alleged in the bill, disposing of them seriatim. The contention that the tax constitutes a cloud upon title is rejected, be-

cause there is no statute making an assessment upon shares of stock a lien upon the real estate of a corporation, and, even if the tax were such a lien, there is no averment that the company owned any real estate, and hence there is no allegation of cloud upon title to real estate, which alone will support the jurisdiction of equity. But this is tantamount to the declaration that if a cloud upon title to real estate had been properly averred and supported by proof, jurisdiction in equity would have existed, notwithstanding the Indiana statute.

As to lack of adequate remedy at law (p. 685), which was claimed to exist because the State of Indiana could not be sued to recover back the tax after payment, the court calls attention to the statute of Indiana, and the construction placed thereon by the Indiana decisions, from which it plainly appears that such a suit may be maintained.

As to multiplicity of suits (p. 689), the court called attention to the fact that under the statute of Indiana, as construed by its courts, only one suit was necessary.

As to irreparable injury (p. 690), the court holds that the allegation of irreparable injury is a mere legal conclusion, and that "there is no fact stated from which it could be inferred that irreparable injury would be likely to result from such enforcement, and where a plain and adequate remedy to recover the amount is given by statute, no such irreparable injury can be inferred. Some averment of specific facts must be made from which the court can see that irreparable injury would be a natural and probable result. Nothing of the sort is shown here." If it had been alleged

and shown, as it is in the case at bar, clearly jurisdiction in equity would have been upheld, notwithstanding the Indiana statute.

The gist of the opinion is stated in this sentence, which appears near its close (p. 690):

> "But the right to resort to a federal court as a court of equity must be founded upon some ground of equitable jurisdiction recognized by the federal courts, and when, as here, no such ground appears, jurisdiction in equity cannot be maintained."

This is an express declaration that, notwithstanding the plain, speedy, and adequate remedy afforded by the definite and comprehensive provisions of the Indiana statute, federal equity jurisdiction would have existed if any of the recognized grounds thereof, such as removal of cloud upon title, or the like, had been presented in Indiana Manufacturing Co. vs. Koehne, and it admits of no doubt that, in such case, the decision of the Supreme Court would have been in favor of the retention of such jurisdiction. How can it justly be said that such a case supports the assertion of the Circuit Court of Appeals to which it is cited? The Supreme Court itself has made the matter too clear for further discussion.

In the later case of Fargo vs. Hart, 193 U. S., 490, which also arose in Indiana, and was a suit to restrain the collection of taxes, the jurisdiction was founded upon one of the ancient and well-recognized grounds which would have been held sufficient in the High Court of Chancery in 1789. As a consequence, and

notwithstanding the statute of Indiana authorizing the payment of the tax and suit to recover it back, jurisdiction in equity of the federal court was sustained, the court saying (p. 503):

> "We do not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes. * * * But it was recognized in the passage just quoted from The Peoples National Bank vs. Marye (191 U. S. 272, 281), that under the present circumstances a resort to equity may be proper. The course adopted is the same that was taken, without criticism from the court, in Adams Express Co. vs. Ohio State Auditor, 165 U. S. 194. It avoids the necessity of suits against the officers of each of the counties of the state, and we are of opinion that the bill may be maintained. Union Pacific vs. Cheyenne, 113 U. S. 516; Pittsburgh, Cincinnati, Chicago & St. Louis Ry. vs. Board of Public Works, 172 U. S. 32."

We therefore respectfully submit that the decisions of the Supreme Court under the Indiana statute not only do not support the opinion of the Circuit Court of Appeals, but, on the contrary, are in direct conflict therewith.

Colorado.

The Colorado statute and the decision of the Supreme Court in Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481, will be separately dealt with in a later portion of this brief. At this point it is sufficient to say that the Colorado statute is much less definite, certain, complete, and comprehensive than those of Tennessee and Indiana; that it has never been held, even by the state courts, to be exclusive, or to oust the equity jurisdiction of the state courts themselves when that jurisdiction is invoked on any of the known and recognized grounds; that the Circuit Court of Appeals has itself twice held that said statute does not and cannot oust, limit, or condition federal equity jurisdiction, if the same be properly invoked; and that the decision of the Supreme Court in the Singer Sewing Machine case not only does not sustain the statement in the court's opinion to support which it is cited, but, on the contrary, is in direct conflict therewith, and clearly recognizes the doctrine that, if federal equity jurisdiction be invoked upon any ground which would have upheld such jurisdiction in 1789, the federal courts cannot renounce such jurisdiction, notwithstanding the fact that a state statute affords a most complete, comprehensive, and certain remedy at law, and notwithstanding the fact that a state statute expressly prohibits resort to equity.

We have now reviewed all of the authorities cited by the court in support of its statement that "such statutes have been frequently before the Supreme Court and have been uniformly held to afford a

plain, speedy and adequate remedy *such as excludes the right to resort to equity.*" As before noted, these decisions were in cases arising in Tennessee, Indiana, and Colorado, and involved the statutes of those states. We respectfully submit that none of them support the conclusion of the Circuit Court of Appeals. On the contrary, all of them are in conflict therewith. But the same question has arisen in cases originating in other states having like statutes, and has been decided by the Supreme Court of the United States. A consideration of these decisions will further clarify the matter.

South Carolina.

This state has a statute authorizing payment under protest and suit to recover back taxes alleged to be illegal, and expressly prohibiting resort to equity. In In re Tyler, 149 U. S., 164, this statute and its effect upon the equity jurisdiction of the federal court were considered by the Supreme Court of the United States. That court (p. 188) said:

> "It has been repeatedly and uniformly held by this court that in a proper case for equity interposition an injunction will lie to restrain the seizure of property in the collection of taxes imposed in contravention of the constitution of the United States. * * * It is said that any restraint upon or correction of unjust and illegal assessment and taxation by judicial interposition is inconsistent with the revenue laws of

South Carolina, which only permit payment under protest and recovery back at law, and our attention is called to statutory provisions forbidding the courts to interfere with the collection of taxes by any writ, process or order, and to various decisions thereunder." * * * (P. 189) "Manifestly the object of this legislation was to confine the remedy of the taxpayer for illegal assessment and taxation, to the payment of taxes under protest, and bringing suit against the county treasurer for recovery back, *but all this is nothing to the purpose. The legislature of a state cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied by the courts of a State does not involve a question of power.*" (Italics ours.)

And in spite of such statute the Federal Courts have constantly entertained equity jurisdiction and administered equitable relief in cases of this character arising in South Carolina. Humphrey vs. Pegues, 16 Wall., 244; Gunter vs. Atlantic Coast Line, 200 U. S., 273, 278, 286, 292.

Virginia.

By a statute of Virginia authorizing a certain bond issue, the coupons from said bonds were expressly made receivable in payment of taxes. By a later statute, the tax collectors were forbidden to re-

ceive these coupons in payment of taxes, and coupon-holders were required to pay the taxes in cash, at the same time making tender of the coupons, and thereafter sue at law to recover back the money so paid. This remedy was by the statute made exclusive of any and all other remedies, and resort to equity thereby prohibited. (See 114 U. S., 270, 298, 302.) The matter came before the Supreme Court in the famous Virginia Coupon Cases.

Poindexter vs. Greenhow, 114 U. S., 270.
Allen vs. Baltimore & Ohio, 114 U. S., 311.

The case first cited was on writ of error to reverse a judgment in an action at law in a state court of Virginia. The second case above cited was on appeal from the United States Circuit Court for Virginia, wherein a bill in equity had been filed and an injunction sought and obtained to restrain the collection of the tax. By considering the two cases together, we obtain a very clear view of the different effect of the statute of a state upon remedies in its own courts and upon equity jurisdiction and equitable relief in the United States courts. The case first cited was an action of detinue to recover certain property which had been seized by the tax collector after the plaintiff had tendered said coupons in payment of the tax. The legislation of Virginia was reviewed solely upon the question as to whether the subsequent legislation impaired the obligation of the contract embodied in the bonds and coupons and the act under which they were issued. Even in the law case the Supreme Court expressly stated (114 U. S., 295) that jurisdiction in equity would have been en-

tertained and relief administered. And this although (p. 298) the statute of Virginia had substituted a remedy by payment and action to recover back, which remedy "thus substituted and declared exclusive is one that requires the taxpayer demanding to have coupons received in payment of taxes, first, to pay the taxes due from him in money, under protest, when, within thirty days thereafter, he may sue the officer to recover back the amount paid, which, on obtaining judgment therefor, shall be refunded by the auditor of public accounts out of the treasury;" and although (p. 302) "we shall assume, however, for the purposes of this opinion, that these acts of the general assembly of Virginia were intended to and do forbid every action, of whatever kind, against the collecting offcer, for the recovery of specific property taken by distraint, or of damages for its caption or detention, and leaves to the coupon-holder, as his sole right of action, the suit to recover back the money illegally collected from him."

But, notwithstanding these express provisions of the Virginia statute clearly prohibiting resort to equity, and plainly providing a certain, speedy, and adequate remedy at law, the Supreme Court in the equity case, which had been brought to enjoin the collection of such taxes (114 U. S., 311, 317), definitely held that the federal court of equity had jurisdiction to entertain the bill and grant the relief sought, and affirmed the action of the Circuit Court, which had issued the injunction.

It would be difficult to imagine a case more clearly illustrating or more conclusively establishing the doctrine for which we here contend.

Wyoming.

The statute of Wyoming, originally enacted in 1876 and appearing in the Revised Statutes of Wyoming, 1887, as section 3821, provided as follows:

> "In all cases where any person shall pay any tax or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer."

The remarkable similarity between this statute and the Colorado statute here involved is at once apparent. While the foregoing statute was in effect, the Union Pacific Railway Company filed its bill in the territorial court of Wyoming to restrain the collection of a certain tax.

> Union Pacific Ry. Co. vs. Cheyenne, 113 U. S., 516.

Territorial courts are, of course, federal courts, and it admits of no doubt that their equity powers and jurisdiction are conferred by the Constitution and laws of the United States.

In the bill of the railway company equity jurisdiction was invoked upon the ground that the tax constituted a lien, and therefore a cloud, upon the title to real estate. The bill was demurred to, on the ground that "complainant should have sought a remedy at law and not in equity." The territorial court

overruled the demurrer, sustained the bill, and granted the injunction. The Supreme Court of the territory reversed this determination, and ordered the bill dismissed. The Supreme Court of the United States reversed the Supreme Court of the territory, and remanded the case, with directions to issue a permanent injunction. Notwithstanding the statute of Wyoming, referred to above, the Supreme Court held that the necessity of removing or preventing cloud upon the title to real estate required the interposition of equity, saying (p. 525):

> "Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot of themselves furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of *cloud upon the title* to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases may be afforded in

courts of equity.' This statement is in general accordance with the decisions of this court, as well as of many state courts." (Citing many cases.)

California.

The California statutes contain complete and comprehensive provisions for the payment under protest of any and all taxes claimed to be illegal or erroneous, and the prompt recovery of the same in an action at law. (Political Code of California, secs. 3804, 3819.) The statutory provisions are much more complete, definite, and certain than those of Colorado, and the remedy afforded is beyond question plain, speedy, and adequate. Nevertheless, and notwithstanding said statutory provisions, the Supreme Court of the United States has definitely and distinctly held that the Circuit Court of the United States has jurisdiction of a bill to enjoin the collection of a tax imposed under the laws of California, and that it is its duty to entertain such a bill and grant the relief sought.

San Francisco National Bank vs. Dodge, 197 U. S., 70, 75, 110, 111.

The Supreme Court reversed both the Circuit Court and the Circuit Court of Appeals, saying (p. 75):

"The appellant bank sued to restrain the enforcement of state, county and city taxes levied for the year 1900 upon shares

of stock of the bank. Adequate averments were made to show equitable jurisdiction. Cummings v. Merchants National Bank, 101 U. S. 153, 157; Hills v. National Albany Exchange Bank, 105 U. S. 319; Lander v. Mercantile National Bank, 186 U. S. 458."

That the matter was fully considered is evident from the vigorous dissenting opinion (pp. 110-111).

Ohio.

The statute of Ohio expressly provides for the payment under protest of a disputed tax, and its recovery back in an action at law. (101 U. S., 156.) Notwithstanding this statute, the Supreme Court of the United States has repeatedly held that a bill to restrain the collection of a tax imposed under the laws of Ohio is within the jurisdiction of a federal court of equity, whenever such jurisdiction is invoked upon any of the grounds which were recognized as sufficient in 1789.

Pelton vs. National Bank, 101 U. S., 143.

Cummings vs. National Bank, 101 U. S., 153.

Sanford vs. Poe, 69 Fed., 546.

Adams Ex. Co. vs. Ohio, 165 U. S., 194.

In Ohio Tax Cases, 232 U. S., 576, which arose in recent years and while said statute or a similar one was still in effect, jurisdiction in equity was nevertheless upheld, the Supreme Court saying (page 587):

> "The right to invoke the equity jurisdiction is clear, for the act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions (sec. 117 of the act; sec. 5506, General Code), and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the act. Shelton vs. Platt, 139 U. S. 591, 598; Ex Parte Young, 209 U. S. 123."

It is true that the statute of Ohio also expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments, or the collection of them. (101 U. S., 157.) And the Circuit Court of Appeals says (217 Fed., 545) that the decision in "Cummings v. National Bank rests upon that statute." That this is not so is evident from the Cummings opinion itself, for the court says (101 U. S., 157):

> "The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.
>
> *Independently of this statute,* however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the constitution,

and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony relief ought to be given." (Italics ours.)

See also:

Norwood vs. Baker, 172 U. S., 269, 291, 292.

From which it plainly appears that, notwithstanding the statute of Ohio authorizing recovery back in an action at law, and even in the absence of a statute providing for an injunction, jurisdiction in equity would nevertheless have been retained, because that jurisdiction was founded upon a ground recognized as sufficient at the time of the adoption of the Judiciary Act, and incorporated therein as a permanent part of the equity jurisdiction of federal courts. As has been repeatedly held, the equity jurisdiction of federal courts cannot be affected, limited, or taken away by the statute of a state. It admits of no doubt that in the case of Cummings vs. National Bank equity jurisdiction would have been upheld in the absence of the Ohio statute authorizing an injunction. It is likewise beyond question that even in the absence of said provision of the state statute such jurisdiction would nevertheless have been upheld, notwithstanding the concurrent provision of the state statute authorizing payment of the disputed tax and its recovery back in an action at law; for the court says (101 U. S., 157):

> "And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in federal courts, nor deprive them of their separate equity jurisdiction, we have also held that where a statute of a state created a new right or provided a new remedy, the federal courts will enforce that right, either on the common law or equity side of its docket, as the nature of the new right or the new remedy requires."

But the equity jurisdiction of the federal courts cannot be enlarged, any more than it can be restricted, by state statutes. True it is that where a state statute grants a new right, such right will be enforced on the equity side of the federal courts, if such right and its enforcement in that way are entirely consistent with the rules and principles of federal equity jurisprudence, and within its jurisdiction as defined by the federal Constitution and statutes. Not otherwise.

> Whitehead vs. Shattuck, 138 U. S., 147.
> Scott vs. Neely, 140 U. S., 106.

It follows that, notwithstanding the statute of Ohio authorizing injunctions, a suit for such an injunction could not be maintained in a federal court of equity unless founded upon some recognized ground of equity jurisdiction, as well as upon the Ohio statute. It follows also that, if the Circuit Court of Appeals is right in holding that a state statute affording a remedy at law by suit to recover back a tax pre-

cludes resort to a federal court of equity, notwithstanding the existence of well-settled and anciently recognized grounds which would otherwise support equity jurisdiction, then the Supreme Court in the case of Cummings vs. National Bank was wrong in upholding the jurisdiction of equity, because Ohio had a statute authorizing the payment and recovery back of the disputed tax. The obvious conclusion is that the Supreme Court in the Cummings case upheld jurisdiction in equity because it was founded upon an ancient and well-settled ground, and could neither be diminished nor enlarged by any state statute, whatever its provisions, and did not uphold said jurisdiction because of the statute of Ohio authorizing injunctions. The latter it could not do in the absence of some other ground of equity jurisdiction recognized in federal courts.

Illinois Life Ins. Co. vs. Newman, 114 Fed., 449.

The Supreme Court has so held in an Ohio case:

Scottish Union vs. Bowland, 196 U. S., 611, 633.

West Virginia.

The statutes of this state prohibit resort to equity and the issue of an injunction to restrain the collection of taxes. While we have not had opportunity to examine these statutes, we assume that they also provide for the refunding of invalid or illegal taxes after their collection.

In Pittsburg etc. Ry. Co. vs. Board of Public Works, 172 U. S., 32, a bill in equity was filed in the United States Circuit Court for an injunction to restrain the collection of taxes alleged to be illegal and invalid. The statute of West Virginia was relied upon as limiting the equity jurisdiction of the federal court. The Supreme Court said (p. 46):

> "The statute also contains a provision that 'no injunction shall be awarded by any court or judge to restrain the collection of the taxes or any part of them so assessed, except upon the ground that the assessment thereof was in violation of the constitution of the United States or of this state, or that the same were fraudulently assessed, or that there was a mistake made by the auditor in the amount of taxes properly chargeable on the property of said corporation or company, and in the latter case no such injunction shall be awarded unless application be first made to the auditor to correct the mistake claimed, and the auditor shall refuse to do so, which facts shall be stated in the bill.' *While this provision cannot, of course, bind the courts of the United States*, it is nearly in accord with the rule governing the exercise of the jurisdiction in equity of those courts, as established by the decisions cited at the beginning of this opinion."

And the Supreme Court held that jurisdiction in equity was not properly invoked, because there was no showing of "special circumstances bringing the

case within some recognized head of equity jurisdiction." If such showing had been made, beyond question jurisdiction would have been entertained, notwithstanding the West Virginia statute.

Oklahoma.

In Western Union Telegraph Co. vs. Trapp, 186 Fed., 114, the Circuit Court of Appeals had under consideration a suit in equity wherein the bill had been filed in the Circuit Court of the United States for Oklahoma, seeking an injunction against the collection of certain taxes imposed under the laws of that state. It was objected to the jurisdiction in equity of the federal court that complainant had an adequate remedy at law under the Constitution and statutes of Oklahoma, but this court said (186 Fed., 121):

> "The rule is that statutory remedies at law furnished by a state in its courts will not oust the equitable jurisdiction of a federal court of equity." (Citing many authorities.)

And in Ritterbusch vs. Atchison, Topeka & Santa Fe, 198 Fed., 46, also a suit in equity in the United States Circuit Court for Oklahoma, wherein injunctive relief was sought against a tax claimed to be invalid, the court of appeals as well as the lower court, entertained the bill and administered the relief sought, notwithstanding the existence of the state-given remedy at law.

South Dakota.

In Wells, Fargo & Co. vs. Johnson, 214 Fed., 180, decided April 24, 1914, the court was considering a bill in equity filed in the District Court of the United States for South Dakota, wherein injunctive relief was sought against taxes claimed to be illegal and invalid. The lower court had dismissed the bill. The Court of Appeals reversed the decree. Objection was made to the jurisdiction in equity, because by the laws of South Dakota an adequate remedy at law existed, consisting of payment and subsequent recovery back in an action at law of the amount of the invalid tax. Upon that subject, the court, speaking through his Honor, Judge Sanborn, said (p. 188):

> "Finally, counsel for the defendant argue, as we understand their brief, that although the law under which the assessments were made is unconstitutional and the assessments and taxes are void, still the plaintiffs are entitled to no injunction against their collection * * *" (P. 189) "(4) Because the plaintiffs have an adequate remedy at law; but the plaintiffs now have, and are entitled, as against these unconstitutional taxes, to the right to keep the amount required to pay them. The rights of the parties have been litigated and determined. The only remedy at law the plaintiffs have is either to defend against a proceeding to collect the taxes on the same grounds which have been presented and sustained in these suits, or to pay the amounts of these taxes under

protest and bring actions at law to recover them back. Neither of these remedies is as prompt, as certain or as complete as the immediate decree of this court and its injunction, to which the plaintiffs have established their right in this litigation."

In Johnson vs. Wells Fargo & Co., 239 U. S., 234, the foregoing decision was recently in all respects affirmed by the Supreme Court of the United States, the court saying (p. 243):

"The contention is made that there was no ground for equity jurisdiction, and that therefore the bill should have been dismissed. This court has frequently held that a bill will not lie in the Federal courts to enjoin the collection of state taxes where a plain, adequate and complete remedy at law has been given to recover back illegal taxes *and the attack upon the assessment is based upon the sole ground that the same is illegal and void.* See Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481, where many of the previous cases in this court are reviewed. But in the present case it was alleged not only that the assessment was unwarranted by the law, *but that the manner of making the assessment amounted to fraud upon the constitutional rights of the express companies or such gross mistake as would amount to fraud, thus averring a distinct and well-recognized ground of equity jurisdiction.* It also appears that the tax of 1909

had been enjoined similarly, and that from the decree in that case no appeal had been taken. *Such continuing violation of constitutional rights might afford a ground for equitable relief.* See Cummings vs. National Bank, 101 U. S. 153, 157, 158; Stanley vs. Supervisors, 121 U. S. 535, 550; Fargo vs. Hart, 193 U. S. 490, 503; Taylor vs. Louisville & Nashville R. R., 88 Fed. Rep., 350." (Italics ours.)

A like decision in a South Dakota case had previously been made, both by the Supreme Court and by the Circuit Court of Appeals.

United States vs. Rickert, 106 Fed., 1.

United States vs. Rickert, 188 U. S., 432, 444.

United States vs. Rickert, 123 Fed., 1007.

Montana.

In Brown vs. French, 80 Fed., 166, the court was considering a bill in equity brought to enjoin the collection of an illegal tax, the jurisdiction in equity being founded upon the assertion that the illegal tax itself, or a sale made thereunder, would constitute a cloud upon the title to complainant's real estate. It was objected that equity was without jurisdiction, because an adequate remedy at law existed, consisting in the payment of the tax and suit to recover it back. But the court said (p. 168):

"The next question presented is as to whether the court has any right to enjoin the collection of this tax. It is claimed on behalf of the defendant that the receiver, Brown, should pay this tax under protest, and then recover the same back from the tax collector in an action at law. The tax in this case was made by law a lien upon the real estate of the bank, although not a tax on such real estate. The tax collector was proceeding, under the provision of the state law, to sell the real estate described, and had advertised the same for sale. Such a sale as this would have created a cloud upon the title of the bank to the real estate sought to be sold. The deed given in pursuance of such a sale would be prima facie evidence that (1) the property was lawfully assessed as required by law; (2) the property was equalized as required by law; (3) the taxes were levied in accordance with law. Pol. Code. Mont. sec. 3897. In the case of Huntington v. Railroad Co., 2 Sawy. 503, 514, Fed. Cas. No. 6,911, Judge Sawyer held that a deed in such a case would cast a cloud upon the title to the land named therein, and said:

'In such case the court will interfere by injunction to prevent a cloud being cast upon the title. The court will enjoin the casting of a cloud upon the title in cases wherein the cloud itself, when cast, would be removed.' Pom. Eq. Jur. sec. 1345.

In the case of Railway Co. v. Cheyenne, 113 U. S. 516, 525, 5 Sup. Ct. 601, 605, Justice Bradley, speaking for the court, said:

'Even the cloud cast upon his title by a tax under which such a sale would be made would be a grievance which would entitle him to go into a court of equity for relief.'

In the following cases it is recognized that a court of equity will interfere to restrain the collection of an illegal tax when some established ground for equitable interference is presented: Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646; Dows v. City of Chicago, 11 Wall. 109; Hannewinkle v. Georgetown, 15 Wall. 547; Lyon v. Alley, 130 U. S. 177, 9 Sup. Ct. 480. Cooley, Tax'n, 422-444. If the preventing or removing a cloud upon a title is a recognized ground of equity jurisdiction, a law of a state which affords a legal remedy for the wrong complained of will not divest the court of equity of its jurisdiction in a proper case. In the case of Barber v. Barber, 21 How. 582, 592, the supreme court said:

'It is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local laws; for the equity jurisdiction of the federal courts is the same in all the states, and is not affected by the existence or non-existence of an equity jurisdiction in the state tribunal.' See, also: Kirby vs. Railroad Co., 120 U. S., 130, 137; 7 Sup. Ct., 430."

Many other decisions of the Supreme Court and other federal courts to the same effect might be cited. But it is certainly unnecessary to go further with the analysis of various state statutes and the citation of federal decisions relating thereto. We respectfully submit that those to which attention has now been directed more than suffice to demonstrate that state statutes and state-given remedies relating to matters of taxation are in no wise excepted from the operation of the general rule. In respect to those, as in respect to all other state statutes and state-given remedies, the unvarying and invariable rule, from which the Supreme Court has never departed, is that, no matter how plain, certain, speedy, adequate, comprehensive, and complete may be the remedy at law which state statutes or state decisions have afforded, and even though the state statute expressly prohibits resort to equity or the issue of an injunction in such cases, nevertheless the federal court of equity will and must entertain jurisdiction and administer equitable and injunctive relief in every case where such jurisdiction is invoked upon a ground which would have been recognized and effective in the High Court of Chancery in England in 1789, because the settled doctrines and practices of that court respecting its equity jurisdiction and jurisprudence were by the Constitution and laws of the United States made a permanent part of the structure of the federal judicial system, and thus placed entirely beyond the reach of any state power whatsoever. Unless, therefore, the statute of the State of Colorado possesses some peculiar attribute which makes it more potent than those of other states, or unless the Supreme Court in Singer Sewing Ma-

chine Co. vs. Benedict, 229 U. S., 481, has overruled the hitherto unbroken line of its decisions to which we have adverted, and annihilated the fundamental principle enunciated by those decisions, which from the foundation of the government had steadily been adhered to, then we respectfully submit that the Court of Appeals committed an obvious and unmistakable error in the ruling of which we now complain. To the inquiry suggested in the foregoing sentence we now address ourselves.

IV.

THE COLORADO STATUTE IS NOT MORE POTENT THAN THOSE OF OTHER STATES. EVEN IN THE STATE COURTS OF COLORADO THE STATUTE IS HELD NOT TO BE EXCLUSIVE, NOR TO OUST EQUITY JURISDICTION, WHEN INVOKED ON SUCH GROUNDS AS ARE HERE PRESENTED.

PREVIOUS DECISIONS OF THE CIRCUIT COURT OF APPEALS, RELATING TO THE COLORADO STATUTE, ARE TO THE SAME EFFECT.

SINGER SEWING MACHINE CO. VS. BENEDICT, 229 U. S., 481, IS NOT IN CONFLICT, BUT IN CONSONANCE, WITH THE SETTLED DOCTRINE HEREINBEFORE DISCUSSED, AND NOT ONLY DOES NOT SUPPORT, BUT IS DIRECTLY OPPOSED TO, THE DECISION IN THE PRESENT CASE.

It is unnecessary at this point closely to analyze the Colorado statute. This we do elsewhere in this

brief. It is sufficient to say here that the Colorado statute does not, in terms, prohibit resort to equity, and, as construed by the highest courts of that state, it does not do so by implication, or at all. It is also sufficient to say here that, in so far as the Colorado statute affords any remedy (if it does) in respect to the recovery at law of money paid on account of invalid taxes, that remedy is incomparably less certain, plain, speedy, adequate, and comprehensive than the analogous remedies provided by the statutes of other states, which have been reviewed in the foregoing pages. In the present opinion the court says (217 Fed., 543):

> "The evil caused by suits in equity to restrain the collection of taxes is grave, and has often been set forth by courts. * * * To correct this evil, statutes of similar import to Section 5750 have been passed in many of the states of the Union. The highest court of Colorado has frequently declared the correction of this evil to have been the object of its statute. Board of Commissioners of Bent County vs. Atchison, T. & S. F. Ry. Co., 52 Colo. 609, 125 Pac. 528. * * *" (P. 7) "It (the Colorado statute) has existed for more than forty years. It has been repeatedly held by the highest court of the state to afford the taxpayer a plain, speedy and adequate remedy."

It will be observed that the court cites but one Colorado case. From this it draws the conclusion stated above, and the further conclusion that the stat-

ute, as interpreted by the Colorado courts, is exclusive, ousts the jurisdiction of equity, even in such a case as the one at bar, and is so potent as to prevent any inquiry or investigation by a court of equity as to whether the remedy which it affords is plain, speedy, and adequate. In this the court is clearly wrong. The guiding rule in the courts of Colorado, steadily adhered to through a long course of decisions, is that, notwithstanding this statute and the one which preceded it, a court of equity has jurisdiction, and must and will afford equitable and injunctive relief against invalid taxation, whenever equity jurisdiction is invoked upon any of the well-settled grounds, such as removal or preventing of cloud upon title, avoidance of multiplicity of suits, systematic, repeated, or intentional over- or under-assessment, the application of an illegal or unconstitutional principle of assessment, and other like grounds, which appear in the case at bar. It admits of no doubt that, if this suit had been brought in a state court of Colorado, on the equity side thereof, jurisdiction in equity would have been retained.

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1. The Colorado Decisions.

In Colorado F. & L. S. Co. vs. Beerbohm, 43 Colo., 464; 96 Pac., 446, decided in 1908, the suit had been filed in equity to cancel a tax, alleged to be illegal, and to restrain its collection. Jurisdiction in equity was expressly invoked for the purpose of removing the cloud upon title created by the invalid tax, and the further cloud which would be created by a sale of the real estate for said taxes and the subsequent issue

of a deed. It was alleged that the land was exempt from taxation. But this was the cause of the invalidity of the tax, and, as the Circuit Court of Appeals says in the present opinion (217 Fed., 544), "we are not concerned with the cause of invalidity of the tax. It may be due to illegality, unconstitutionality or fraud. Whatever the cause, it can do no more than make the tax invalid, and that alone is not a ground of equitable jurisdiction." In the Beerbohm case the trial court sustained a demurrer to the complaint, which demurrer was expressly based upon the ground that the case was not within the jurisdiction of equity (p. 470). This point received specific consideration in the Supreme Court (pp. 479 et seq.), and, notwithstanding the Colorado statute, the Supreme Court held that the case was within the jurisdiction of equity, and that equitable and injunctive relief should be afforded, founding its decision (p. 481) on Fargo vs. Hart, 193 U. S., 490, hereinbefore cited and relied upon by us, and concluded the opinion as follows (p. 482):

> "Our conclusion is that the plaintiff's complaint alleged facts sufficient to entitle it to the injunctive and other relief sought, and that the court erred in sustaining the demurrer thereto, and in striking from the files the supplemental complaint, and in rendering the judgment complained of."

In Gale vs. Beerbohm, 43 Colo., 521; 96 Pac., 449, decided in 1908, the same ruling was made, upon a similar record, and under like circumstances.

In Gale vs. Statler, 47 Colo., 72; 105 Pac., 858, decided in 1909, the trial court had sustained a de-

murrer to, and dismissed, a bill in equity which sought an injunction against the collection of a tax, and its cancellation. An examination of the record discloses that jurisdiction in equity was expressly invoked to prevent and remove a cloud upon the title to plaintiff's real estate. The question of jurisdiction in equity was specifically raised and discussed in the briefs filed in the Supreme Court, the court's attention being particularly directed to the statute here in question. The Supreme Court reversed the decision of the trial court, held that equity had jurisdiction notwithstanding said statute, and said (p. 76):

> "The further contention of defendant that plaintiff may not maintain this action to enjoin the collection of the tax, because he might have had appropriate relief, if he was entitled to any, before the board of county commissioners, is also without merit. The sections of the statute referred to give him the absolute right to have his grievance heard by the county assessor and, if he does not get it there, an appeal to the district or county court, where he may again be heard. We are cited to no provisions of the statute which take away this right, *whatever may be the power of the board to grant relief after an erroneous tax has been paid.*" (Italics ours.)

And thereupon the case was remanded, with directions to the court below to enter a judgment enjoining the collection of the tax.

The foregoing decisions are not exceptions to the general rule, but voice the settled doctrine of the state courts, repeatedly enunciated.

In Insurance Co. vs. Bonner, 24 Colo., 220; 49 Pac., 366, decided in 1897, the action had been brought to enjoin the collection of a tax. No allegation or showing was made of cloud or threatened cloud upon title, or of any other matter bringing the case within any of the recognized heads of equity jurisdiction. Relief in equity was denied by the trial court, and this was affirmed by the Supreme Court. The language of the Supreme Court's opinion makes it certain that, if any of the settled grounds of equity jurisdiction had been made to appear, such jurisdiction would have been retained and equitable and injunctive relief afforded. In the fourth syllabus (p. 220) it is said:

> "Injunctions to restrain the collection of the public revenue are not favored. That a tax is void is not, of itself, sufficient to justify the granting of a writ to restrain its collection. The case must, in addition, be made under some of the well recognized heads of equity jurisdiction."

In the opinion (p. 223) it is said:

> "That a tax is void is, of itself, not sufficient to justify the granting of a writ. The case must, in addition, be brought under the head of some of the well recognized heads of equity jurisdiction. Dows vs. Chicago, 11 Wall. 308. High on Injunctions (3rd ed.), Sec. 485 et seq."

In the series of sections thus referred to in High on Injunctions the author expressly states the doc-

trine that equity has jurisdiction to relieve against an invalid tax when it does or will create a cloud upon title, or when other established grounds of equity jurisdiction are presented.

High on Injunctions (3rd ed.), secs. 494 et seq.

And so in the Bonner case, *supra*, the court continues (p. 224):

> "Ordinarily the writ will not lie to restrain the collection of an illegal tax on personal property; and while it is only by inference that we are advised of the ownership by plaintiff of personal property, there is no allegation, or even inference, that the plaintiff is the owner of any real estate, the title of which might, by any possibility, be clouded."

And this is equivalent to holding that, if such facts had been made to appear, equity would have intervened; and in Charlton vs. Kelley, 24 Colo., 273; 50 Pac., 1042, decided in 1897, and reported in the same volume with the Bonner case, the Supreme Court expressly upholds jurisdiction in equity to relieve from an invalid tax and its results, where cloud upon the title to real estate is involved.

In Evans vs. Denver, 26 Colo., 193; 57 Pac., 696, decided in 1899, jurisdiction in equity was expressly invoked, upon the ground that the tax was a lien upon real estate, and that, if a sale occurred for said tax, the result would further cloud the title. The court below had dismissed the suit, which had been

brought to enjoin the collection of the tax, but the Supreme Court reversed this result and remanded the case, with directions to the court below to enjoin such collection.

In Boston & Colorado Smelting Co. vs. Elder, 20 Colo. App., 96; 77 Pac., 258, decided in 1904, the suit was brought in equity to cancel a tax and enjoin its collection. An examination of the record discloses that jurisdiction in equity was expressly founded upon the ground that the tax itself, and the deed which would be issued in case of sale, constituted clouds upon the title to plaintiff's real estate. A demurrer was filed, raising the question that the court of equity was without jurisdiction; which demurrer was sustained and the complaint dismissed by the trial court. The Court of Appeals reversed this judgment, upheld jurisdiction in equity, and remanded the case for a determination of the merits. This notwithstanding the statute here in question.

In Hallett vs. Arapahoe County, 40 Colo., 308; 90 Pac., 678, decided in 1907 (cited by the Supreme Court in the Singer Sewing Machine case), the court considered together four suits, which had been brought by the plaintiff to restrain the collection of taxes assessed for the years 1897, 1898, 1899, and 1900. The assessment was upon moneys, notes, and credits, and Judge Hallett contested the same, because, he said, he did not own any such property. No real estate was involved. An examination of the records before the Supreme Court discloses that there was absolutely no allegation bringing the case within any of the recognized heads of equity jurisdiction. There was not even a statement of the legal conclu-

sion that plaintiff "had no plain, speedy and adequate remedy at law." The sole allegation was that the tax was invalid, because the plaintiff did not own any such property, and it had been added to his assessment without notice. As the law then stood (Mills' Ann. Stats., Vol. 2, sec 3771), taxes levied or assessed upon personal property were a lien upon that precise property, and that only, "and if such property, so taxed, or any part thereof, shall be removed from the county wherein the same was taxed, or is so conditioned that the treasurer cannot find or obtain the same, then the county treasurer shall sue the person so taxed in an action of debt, in any court of his county having jurisdiction." Inasmuch as plaintiff averred that he had no such property as that which had been assessed, it is manifest that the only remedy of the treasurer was an action at law, in which plaintiff might have raised all questions as to the validity of the tax. The situation was exactly the same as that presented in Singer Sewing Machine Co. vs. Benedict, 179 Fed., 628, 633. And so, in the Hallett case, the Supreme Court held, as stated in the first syllabus:

> "Equity will not enjoin the collection of an illegal tax, unless the taxpayer has no adequate remedy at law, or its collection will result in irreparable injury to him, or lead to a multiplicity of suits;"

pointed out (pp. 315-318) the complete absence of any allegation of this nature, saying (p. 318):

> "By Section 3777, 2 Mills' Ann. Stats., it is provided that taxes paid which shall

> thereafter be found to be erroneous or illegal, shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded to plaintiff by this section is not adequate;"

pointed out that the complaints utterly failed to allege that the defendants had attempted, were attempting, or threatened to attempt to collect the tax, saying (p. 319):

> "So far as it appears from the record, he may never be called upon to pay these taxes, nor any steps taken to enforce their collection against him, so that it wholly fails to appear that any wrong has been, or will be, inflicted, which should be redressed;"

and the court reached its final conclusion (p. 319):

> "For the reason that the respective complaints do not state facts from which it appears that the plaintiff has been, or will be, injured because of the assessments complained of, and the taxes levied thereon."

From the language quoted above, and from other portions of the opinion, it is plainly inferable that, if proper averments had been made, bringing the case under some recognized head of equity jurisdiction, the ruling would have been different, notwithstanding the statute of Colorado.

In Board of Commissioners of Bent County vs. Atchison, T. & S. F. Ry. Co., 52 Colo., 609; 125 Pac., 528, decided in 1912 (the only Colorado case cited in the opinion of the Circuit Court of Appeals), the court considered a bill in equity, filed by the railway company, to enjoin the collection of a *county* tax, arising from what was alleged to be an illegal *county* levy, made to pay warrants issued for the construction of a county bridge. Neither the state nor any city, town, or school district was interested therein. The amount of the tax complained of was fixed. It was all illegal or all legal, and this was a question of law. The case presented none of the features appealing to equity jurisdiction in the case at bar. An examination of the record discloses that there was neither allegation nor proof bringing the case within any recognized head of equity jurisdiction. Because of the total absence of any such allegation or showing, the court intimated that equity was probably without jurisdiction. It was clearly recognized, however, that, if such allegations or such showing had been made (as they are in the case at bar), the result would have been otherwise. In the first syllabus it is said:

> "Public interest, statutory enactment and judicial announcement are opposed to interference by injunction with the collection of public revenues. Whoever seeks such relief *must bring his case within some recognized ground of equitable jurisdiction.*" (Italics ours.)

And in the course of the opinion, after referring to the Colorado statute here in question, the court says (p. 614):

> "We do not hold that this statute affords an adequate remedy to the taxpayer in all cases founded upon an erroneous or illegal tax. We readily conceive that a case might arise in which the complainant would not have an adequate remedy by an action at law based upon the statute. Facts like those in Cummings vs. National Bank, 101 U. S. 153, would bring a case within the exception. The case at bar, however, is not within the exceptions recognized by the authorities, and the trial court erred in taking jurisdiction of the case."

The Circuit Court of Appeals (217 Fed., 544, 545) seems to think that the Supreme Court of Colorado in the Bent County case, by its reference to the Cummings case, meant to hold that the only exception to the rule of non-interference by equity was that "in rare cases it may happen that the fraud of the taxing officers will create a condition which statutes like Section 5750 will not enable courts to redress," or when, as the Circuit Court of Appeals holds is true of the Cummings case, the state statute expressly before reviewed the Cummings case and the comment of the Circuit Court of Appeals thereon. It has been demonstrated, we submit, that the Cummings case was not based upon the Ohio statute, and could not have been. It was based upon settled and recognized grounds of equity jurisdiction, independent of the

Ohio statute. These grounds were not only constructive fraud on the part of the taxing officers, consisting of repeated, systematic, and intentional discriminations in assessment, but also the grounds that a trust was involved and that a multiplicity of suits would be avoided. The principle enunciated in the Cummings case was that a court of equity, and particularly a federal court of equity, would assume jurisdiction whenever invoked upon any of the well-settled and recognized grounds, notwithstanding a state statute permitting payment of the disputed tax and a suit to recover it back. That this is so has been expressly declared by the Supreme Court.

In Allen vs. Baltimore & Ohio R. R. Co., 114 U. S., 311, the Cummings case was reviewed. In the Allen case, notwithstanding a statute of Virginia giving an adequate remedy at law, jurisdiction in equity was sustained. Such jurisdiction had been invoked upon the following grounds (p. 313):

> "That the acts complained of prevent the proper exercise by the complainant of its franchise, involving a public duty of operating the railroads of which it is lessee and in possession; to avoid multiplicity of suits; the want of adequate remedies at law; *to remove the cloud upon the title to the railroad property, occasioned by the fact that assessed taxes are a lien thereon.*" (Italics ours.)

And, speaking of jurisdiction of equity and remedy by injunction, the court says (p. 314):

> "The circumstances of this case bring it, so far as that remedy is in question, fully

> within the principle firmly established in this court by the decision in Osborne vs. the United States Bank, 9 Wheat. 739, *and within the terms of the rule as declared in Cummings vs. National Bank, 101 U. S. 153, quoted in the case of Poindexter vs. Greenhow.*" (Italics ours.)

And, as we shall presently demonstrate, Cummings vs. National Bank has been repeatedly cited by the Supreme Court of the United States in support of the doctrine that in tax cases equity jurisdiction will attach, and equitable and injunctive relief be afforded, whenever any of the settled and recognized grounds of such jurisdiction are presented, without regard to whether a state statute or state policy authorizes or prohibits injunctive relief, or does or does not afford an adequate remedy at law, by payment and suit to recover back. These facts must have been known to the Supreme Court of Colorado when its opinion in Board of Commissioners of Bent County vs. Atchison, Topeka and Santa Fe Railway Co. was written, and the language of that opinion, as quoted above, amounts to an express adoption, as the law in Colorado, of the rule announced in Cummings vs. National Bank, *supra*, as construed in Allen vs. Baltimore & Ohio R. R. Co., *supra*, and numerous other decisions of the United States Supreme Court. A further consideration of the Colorado decisions makes this clear beyond question.

In Foster vs. Hart Mining Co., 52 Colo., 459; 122 Pac., 48, decided in 1912, and reported in the same volume with the case last above reviewed, a

suit in equity had been brought to restrain the collection of taxes, alleged to be invalid, to procure the cancellation thereof and of certificates of sale issued thereon, and to prevent the issuance of tax deeds. An examination of the record which was before the Supreme Court discloses that jurisdiction was expressly invoked upon the grounds: (1) that the tax constituted a lien, and therefore a cloud upon the title to plaintiff's real estate, that the sales and certificates of sale likewise constituted such clouds, and that the deeds when issued would further cloud said title; (2) that the illegal assessment which, it was alleged, rendered the tax invalid, was the result of disobedience of the law and the application of a wrong principle of assessment, which had been systematic, repeated, and intentional, and therefore constructively fraudulent; (3) that the intervention of equity would avoid a multiplicity of suits; (4) that the statutes of Colorado, particularly the statute purporting to authorize payment of the tax and suit to recover it back, did not afford an adequate remedy. It appears from the record that the question of jurisdiction in equity was bitterly contested, both in the trial court and in the Supreme Court. It was argued at length in the briefs of both parties. But, notwithstanding the statute here involved, equity jurisdiction was sustained, and equitable and injunctive relief administered, both by the trial court and by the Supreme Court. The decision just referred to makes very clear what was meant by the Supreme Court when, at the same term and within a few weeks, it said, in the Bent County case, *supra:*

> "We do not hold that this statute affords an adequate remedy to the taxpayer in all cases founded upon an erroneuos and illegal tax. We readily conceive that a case might arise in which a complainant would not have an adequate remedy by an action at law, based upon the statute."

In County of Teller vs. Acorn Mining Co., 23 Colo. App., 407; 130 Pac., 74, decided in 1913, there was involved a suit in equity, brought to enjoin the collection of a tax upon certain real estate, consisting of mining claims. We have examined the record, from which it appears that equity jurisdiction was expressly invoked upon the ground that the tax and its results did and would constitute clouds upon the title to plaintiff's real estate. Such jurisdiction was contested by defendants, both in the trial court and in the Court of Appeals. It was, nevertheless, sustained, and equitable and injunctive relief administered and approved, notwithstanding the statute of Colorado relating to payments and refunds.

In State Board of Equalization vs. Bimetallic Inv. Co., 56 Colo., 512; 138 Pac., 1010, decided in January, 1914, jurisdiction in equity was entertained to enjoin the extending of an assessment alleged to be illegal, and the consequent creation of a tax which would be invalid, but would, nevertheless, constitute a cloud upon the title to plaintiff's real estate. We have examined the record in said case, from which it appears that jurisdiction was expressly invoked upon the grounds that it would prevent a cloud upon title to real estate and avoid a multiplicity of suits. Such

jurisdiction was entertained by the trial court, and equitable and injunctive relief administered. The Supreme Court likewise entertained jurisdiction in equity, but decided the merits of the controversy against the plaintiff, holding that the assessment was, and the consequent tax would be, legal and valid.

In Bimetallic Investment Co. v. State Board of Equalization, United States Supreme Court, 239 U. S., 441, decided December 20, 1915, the foregoing decision was affirmed. The objection of lack of equity jurisdiction was raised and expressly noticed in the opinion of this Court, as follows:

> "There are suggestions on the one side that the construction of the state constitution and laws was an unwarranted surprise, on the other that the decision might have been placed, although it was not, on the ground that there was an adequate remedy at law. With these suggestions we have nothing to do. They are matters purely of state law. The answer to the former needs no amplification; that to the latter is that the allowance of equitable relief is a question of state policy, and that as the Supreme Court of the state treated the merits as legitimately before it, we are not to speculate whether it might or might not have thrown out the suit upon the preliminary ground."

In Price vs. Kramer, 4 Colo., 546 (cited by the Supreme Court in the Singer Sewing Machine case), no ground whatever of equitable jurisdiction appeared, the sole allegation being that the tax was

invalid and illegal. No real estate was involved. The tax was upon certain cattle, and could be collected only by distraint of the particular cattle assessed. These cattle were ranging from one county to another, and the dispute was as to which county was entitled to tax the same. The taxes were those (p. 547) "assessed and levied by Pueblo County," and those (p. 548) "assessed and levied by Bent County," one or the other of which was claimed to be invalid. Therefore no possible multiplicity of suits appeared. Nothing was involved but a county tax—not that of the state, nor of any school district, city, or town. None of the grounds of equity jurisdiction inherent in the case at bar, none of those repeatedly approved by the state Supreme Court, in any way appeared. Under such circumstances, the court said, applying a familiar principle (p. 555):

> "Against an illegal tax complainant has a full and adequate remedy at law, and we see no reason why *in this case* he should not be remitted to that remedy." (Italics ours.)

The court was careful to restrict its decision to the facts of the case before it.

In Woodward vs. Ellsworth, 4 Colo., 580 (also cited by the Supreme Court in the Singer Sewing Machine case), a bill in equity, and an injunction issued thereon to restrain the collection of a tax alleged to be illegal, were sustained, notwithstanding the Colorado statute and the remedy afforded thereby, which the court (p. 581) expressly noticed and commented upon. The property involved was personal property only, notwithstanding which jurisdiction in equity was sustained.

We have thus reviewed all of the Colorado cases cited by the Supreme Court in the Singer Sewing Machine case. We have also reviewed and analyzed the decision in the only Colorado case cited by the Circuit Court of Appeals in its present opinion. We have likewise presented and reviewed many other Colorado cases, particularly recent ones, not mentioned either by the court in the instant case or by the Supreme Court in the Singer case. These cases, we submit, demonstrate beyond all question that the Circuit Court of Appeals has erred respecting the construction, scope, and effect of the Colorado statute, as conclusively declared by the highest courts of that state. Not only did the court err in permitting the Colorado statute to limit in any way federal equity jurisdiction, but it erred again when, after attributing to the Colorado statute a power which it could not possess, it gave it a construction and effect in the federal court of equity which state authority has never permitted it to have, even in the courts of Colorado.

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2. Former Decisions of the Circuit Court of Appeals.

Not only is the present opinion directly opposed to the decisions of the Colorado courts, but it is in irreconcilable conflict with former decisions of the Circuit Court of Appeals relating to the same statute.

In Atchison, T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, a case similar in many respects to the one at bar, relief had been denied by the Circuit Court for the District of Colorado, but its decree was reversed, jurisdiction in equity upheld, and the case remanded,

with instructions to afford relief. The subject of jurisdiction in equity is discussed at pages 469-471. The Colorado statute here involved is dealt with at length. It is expressly held that the remedy afforded by that statute, if any, is not, and could not be, so certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. In addition to that, it is held that the case falls within several of the well-settled and well-recognized heads of equity jurisdiction, such as fraud and mistake, and systematic, intentional continuing and repeated application of an illegal and unconstitutional principle of assessment; all of which require the exercise of federal equity jurisdiction, notwithstanding the Colorado statute. On the subject of the Colorado statute the court, speaking through his Honor Judge Sanborn, says (p. 470):

> "Counsel cite the statute of Colorado, which provides that the board of county commissioners shall refund all taxes paid by any person which are afterwards found to be erroneous or illegal (Laws Colo. 1902 (Ex. Sess.) p. 146, c. 3, Sec. 202), and contend that the complainant has an adequate remedy by an action at law based upon this statute. Conceding, without deciding, that it might maintain such an action to recover back the illegal portion of the tax against its property, is that remedy as adequate as the injunction of the court below? The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of

justice as the remedy in equity. Williams vs. Neely, 134 Fed. 1, 10, 67 C. C. A. 171, 180, 69 L. R. A. 232; Boyce vs. Grundy, 3 Pet. 210, 215, 217, 7 L. Ed. 655; Springfield Milling Co. vs. Barnard & Leas Mfg. Co., 81 Fed. 261, 265, 26 C. C. A. 389, 393; Brown vs. Arnold, 131 Fed. 723, 67 C. C. A. 125. The facts and the law of this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has and it is entitled to keep the $3,580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it, and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this $3,580 to the defendant, must bring, try, and prosecute to judgment an action at law against the county to recover it back, must possibly, it may be probably, come again to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for mandamus to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. This proposed remedy is neither as prompt, nor as certain, nor as complete, as the relief which may be granted through this suit in equity."

In Singer Sewing Machine Co. vs. Benedict, 179 Fed., 628 (also a case originating in Colorado), the

foregoing decision was expressly reaffirmed, the court, speaking through his Honor Judge Adams, saying (p. 632):

> "The statute of Colorado, (Sec. 5750, Revised Statutes 1908, Sec. 202, Revenue Act, approved March 2, 1902, Session Laws Colorado, 1902, p. 146), providing that the board of county commissioners shall refund to the taxpayer any erroneous or illegal taxes which he has been compelled to pay, has been held by this court (Atchison, T. & S. F. Ry. Co. vs. Sullivan, 173 Fed. 456, 470) not to afford an adequate remedy to a taxpayer who has been required to pay an illegal tax, and we therefore omit further consideration of that statute as a basis for legal relief."

In the Singer Sewing Machine case equity jurisdiction was not sustained, because no ground whatever appeared upon which it could be founded, but the court's previous action in upholding equity jurisdiction in the Sullivan case, notwithstanding the Colorado statute, was expressly reaffirmed and approved (p. 633). The court, quoting from the Sullivan case, pointed out that jurisdiction was there founded upon ancient and well-settled grounds, and concluded (p. 634):

> "We have no occasion or disposition to criticise the doctrine of that case, but it has no application to the pleadings or facts of this case."

Equity jurisdiction was sustained, notwithstanding remedies given by the state, and a like doctrine enunciated by this court in the following cases:

Western Union Telegraph Co. vs. Trapp, 186 Fed., 114, 121.

Ritterbusch vs. Atchison, Topeka & Santa Fe, 198 Fed., 46.

Wells Fargo & Co. vs. Johnson, 214 Fed., 180, 188.

The case last cited was decided on April 24, 1914, nearly a year after the decision in Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481. At page 188 the court, speaking through his Honor Judge Sanborn, expressly reiterates the doctrine of the Sullivan case, in almost exactly the same words.

It has since been affirmed.

Johnson vs. Wells Fargo & Co., 239 U. S., 234, 243.

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3. Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481, Establishes No New Rule, Enunciates No Different Doctrine, nor Does It Overrule Prior Decisions of the Supreme Court or Those of the Circuit Court of Appeals or the Colorado Supreme Court.

Did the Supreme Court in the Singer case intend to reverse the hitherto unruffled current of its decisions? Did that case mark the point at which the course theretofore pursued in an unbroken line was

abandoned, and exactly the opposite course of decision entered upon? We earnestly contend that it did not. No question was presented in the Singer case which called for or permitted such a result. A brief consideration of the facts there presented makes this manifest.

The case arose in the City and County of Denver, a consolidated municipality, wherein since 1902 there has been but one government both for city and county affairs (Const. of Colo., Art. XX; Rev. Stats. 1908, pp. 55 et seq.), and but one school district embracing the entire city and county (Const., Art. XX, sec. 7; Rev. Stats. 1908, sec. 759), all funds, both of the city and county and the school district, being held in one treasury and in the custody of a single treasurer.

In the year 1905 the company made a return to the assessor of taxable personal property, disclosing a certain value. Thereafter the assessor, without notice to the company, as alleged, enormously increased the amount and value of the personal property as returned. Thereafter a tax list or warrant authorizing the collection of the tax on the total amount of the personal property, as increased by the assessor, was delivered to the city and county treasurer, whose duty it became to collect the tax assessed thereon. The company tendered taxes upon the original amount as returned by it. It disputed the right to collect the remainder. The sole ground of the claimed invalidity of the tax was the failure of the assessor to give notice of the increase. It was also the sole ground upon which jurisdiction in equity was invoked.

No tax upon real estate was involved, for the tax was expressly laid upon the assessment of personal property.

No real estate was involved, because the company had none.

It was not even necessary to protect personal property from distraint, because, as the record expressly shows, the only property of any kind which the company had ever had in the City and County of Denver consisted of certain moneys, notes, and credits, and these had been removed from the state prior to the attempt to enforce the tax (179 Fed., 632, 633).

No repeated or systematic under- or over-assessment or application of a wrong principle of assessment was involved. The cause of action was based upon the single omission in one specific instance of a certain notice.

No involved issues appeared requiring complicated evidence for their solution; for the cause of action depended upon a single fact—to-wit, the alleged omission of the notice and its legal result. The proof was as simple as in a suit upon a promissory note.

No multiplicity of suits was involved, because, if the tax was invalid and could be recovered back in an action at law, only one action was necessary against the consolidated municipality.

No interference with property devoted to a public use, and consequent injury to the public, was involved, because (1) a sewing-machine company is not a public-service corporation, and its property is not devoted to a public use, and (2) it had no property within the jurisdiction of the taxing authority.

As we have repeatedly pointed out, all of these well-recognized and settled grounds of equity jurisdiction appear in the case at bar.

As the Circuit Court of Appeals said in the Singer case (179 Fed., 630):

> "There are no averments in the bill showing any fraud, accident or mistake which conduced to the overvaluation, any cloud upon title to real estate, or danger of multiplicity of suits, or any averments planting complainant's right to relief upon any other head of equity jurisdiction excepting inadequacy of the legal remedy."

Under the circumstances recited above, the court held that the only method by which the treasurer could have undertaken to collect these taxes was by the action at law therefor against the delinquent taxpayer expressly authorized by section 5677 of the Revised Statutes (179 Fed., 633). In this suit the company might interpose as defenses all of its objections to the tax. This was regarded as an adequate remedy at law, which, in the absence of any of the recognized grounds of equity jurisdiction, prevented a federal court of equity from entertaining the suit.

The decree of the Circuit Court of Appeals was affirmed by the Supreme Court. Did the latter court intend to overrule the process of reasoning by which the lower court arrived at its decision? Did the Supreme Court intend to hold that, in a case where jurisdiction in equity is invoked upon any of the grounds which would have supported it in the High Court of Chancery in England in 1789, such jurisdiction is or can be ousted, limited, or controlled by any statute of a state? We respectfully submit that it did not, and that its opinion is clear evidence of the

fact. Even if the learned writer of that opinion had in terms announced such doctrine, the statement would have been an interesting observation, but not an authority; for no such question was, or could be, involved. Such a situation, if it had arisen, would have been controlled by the famous and oft-quoted words of Chief Justice Marshall in Cohens vs. Virginia, 6 Wheat., 264, 399:

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

But the Supreme Court in the Singer case did not so hold, because it could not. It did not intend so to hold, as is manifest from the language of the opinion. On the contrary, it reiterated and adhered to the settled doctrine now relied upon by us and enunciated repeatedly in the many decisions hereinbefore cited. This also is manifest from the language of the opinion.

In delivering the opinion of the Supreme Court in the Singer case (229 U. S., 481), Mr. Justice Van Devanter first reviewed the facts, which clearly showed that no matter of equitable cognizance was presented, and that the case did not fall within any of the heads of equity jurisdiction recognized and given effect in the High Court of Chancery in England in 1789. Thereupon the court, quoting from one of its former decisions, said (p. 485):

> "In such a case the aggrieved party is referred to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity."

Thereupon the learned justice referred to the Colorado statute here involved, quoting a portion thereof, and citing three Colorado cases, all of which, as well as many other Colorado cases, have been reviewed in section 1 of subdivision IV of this brief. He then stated (p. 486):

> "We refer to these cases, not as defining the jurisdiction in equity of the circuit court, *for that they could not do* (citing cases), but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid." (Italics ours.)

This statement is to be considered in view of the fact that such a recovery would in the Singer case be had in a single suit against the consolidated municipality, the City and County of Denver, which represented in one entity the state, the county, the city, and the school district, as hereinabove pointed out.

The Supreme Court's opinion then proceeds as follows (p. 487):

> "Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, *unless there be special circumstances showing the contrary.* Dows vs. Chicago, 11 Wall. 108, 112; State Railroad Tax Cases, 92 U. S. 575, 613-614; Shelton vs. Platt, 139 U. S. 591, 597; Allen vs. Pullman's Palace Car Co., id. 658, 661; Indiana Mfg. Co. vs. Koehne, 188 U. S. 681, 686." (Italics ours.)

The Supreme Court thereupon considered the two contentions which alone were advanced by the company as presenting recognized grounds of equity jurisdiction, which would uphold it in spite of the adequate remedy at law. These were: (1) that the tax list conclusively determined all questions in favor of the validity of the tax; but the Supreme Court pointed to the express provision of the Colorado statute, that it should be *prima facie* evidence only; (2) that the act of the assessor in making the additional assessment, without giving notice, was a fraud, an accident, or a mistake, and therefore within the jurisdiction of equity; but the Supreme Court pointed out that no such ground of equity jurisdiction was alleged in the bill, and that, in any event, the omission on a single occasion, in a specific instance, to give a certain notice was not a fraud, an accident, or a mistake of the kind which, under the previous decisions of the court, would uphold resort to equity. That, as we have repeatedly said, and as the Supreme Court

and the Circuit Court of Appeals have time and again stated, must consist of systematic, repeated, and intentional over- or under-assessment, violation of statute, or application of an illegal or unconstitutional principle of assessment, and not an isolated case of one failure to obey a statute requiring notice, which failure might have been inadvertent. Where, however, fraud of the required kind, such as is defined above, does appear, the court of equity has always entertained jurisdiction, and the Supreme Court in the Singer case, by the clearest possible inference, holds that it should.

What are the "special circumstances showing the contrary," referred to by the Supreme Court at page 487, which will uphold equity jurisdiction, notwithstanding a state-given remedy at law? The question is answered by the authorities cited by the Supreme Court in support of the statement.

In Dows vs. Chicago, 11 Wall., 108, none of the settled grounds of equity jurisdiction were made to appear. The court said (p. 109):

> "No *special circumstances* respecting the tax or its enforcement were alleged in support of the equitable jurisdiction of the court. * * * The illegality of the tax and the threatened sale of the shares for its payment constitute, of themselves alone, no ground for such interposition. There must be some *special circumstances* attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive

> remedy of injunction can be invoked. * * *" (P. 110) "It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. * * *" (P. 112) "And, except where the *special circumstances* which we have mentioned exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. * * * Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action." (Italics ours.)

In the foregoing quotation we have italicized the words "special circumstances" to emphasize the fact that the phrase is, beyond question, used by the Supreme Court in the Singer Sewing Machine case in the same sense in which it is employed in Dows vs. Chicago. That being true, it admits of no doubt that what the court intended to hold, and did hold, in the Singer Sewing Machine case, and what is expressed in the most unmistakable way, was that, notwithstanding the remedy at law, if any, afforded by the Colorado statute, the federal court of equity could, and should, entertain jurisdiction whenever such "special circumstances" existed as the avoidance of a

multiplicity of suits, or other irreparable injury, or, where the property is real estate, the prevention or removal of cloud upon the title.

State Railroad Tax Cases, 92 U. S., 575, presented another instance where none of the recognized grounds of equity jurisdiction whatever appeared. The court again defined, and in the same manner, the "special circumstances" upon which jurisdiction in equity might be invoked, citing and quoting from Dows vs. Chicago, *supra*. The court said (p. 614):

> "There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction;"

and concludes upon this branch of the case as follows (p. 615):

> "In the examination which we have made of these cases, we do not find any of the matters complained of to come within the rule which we have laid down as justifying the interposition of a court of equity. There is no fraud proved, if alleged. There is no violation of the Constitution, either in the statute or in its administration by the board of equalization. No property is taxed that is not legally liable to taxation, nor is the rule of uniformity prescribed by the Constitution violated."

In Allen vs. Baltimore & Ohio R. R. Co., 114 U. S., 311, 315, the opinion in the State Railroad Tax

Cases, *supra*, is cited, and the foregoing quotations therefrom are made; and, referring thereto, the court says:

> "If the facts here negatived had been affirmed, the converse of the rule would have been equally applicable."

And the court sustained jurisdiction in equity, notwithstanding a full, complete, and adequate remedy at law afforded by the statute of Virginia, which conclusively demonstrates that the Supreme Court regards the State Railroad Tax Cases, *supra*, as a definite authority supporting jurisdiction in equity, when invoked upon such grounds as are presented in the case at bar. Indeed, Dows vs. Chicago, *supra*, and State Railroad Tax Cases, *supra*, have been cited by the Supreme Court times without number as authorities supporting jurisdiction in equity, whenever any of the "special circumstances" mentioned in those decisions appear. An inspection of Rose's Notes on the United States Reports, or any other standard list of annotations, demonstrates this.

Shelton vs. Platt, 139 U. S., 591, 597; Allen vs. Pullman's Palace Car Co., id., 658, 661; Indiana Mfg. Co. vs. Koehne, 188 U. S., 681, 686, the other cases cited at this point in the Supreme Court's opinion in the Singer case, have been hereinbefore reviewed. We need not repeat what was there said. It is sufficient to say that in none of those cases did any recognized ground of equity jurisdiction appear, and that in all of them the "special circumstances" under which such jurisdiction would attach were specified, and that the "special circumstances" so specified in each instance

clearly exist and have been pointed out in the case at bar.

In the late case of Raymond vs. Chicago Union Traction Company, 207 U. S., 20, all of these decisions are reviewed, their effect stated, and jurisdiction upheld, upon grounds which cannot be distinguished from those here presented.

Under such circumstances, how can it possibly be said that the opinion of the Supreme Court in the Singer Sewing Machine case is an authority supporting the proposition that equity jurisdiction does not exist because of the Colorado statute, and notwithstanding the presence of all of the "special circumstances" there distinctly held to be sufficient to support such jurisdiction? On the contrary, is it not perfectly clear that the opinion of the Supreme Court in the Singer Sewing Machine case takes its place in the lengthy array of the numerous other like decisions of that court, as authority in support of the settled doctrine that, when such "special circumstances" exist as are shown in the case at bar, the federal court of equity will, and must, assume jurisdiction, notwithstanding the Colorado statute, and notwithstanding any state statute or state-given remedy, however certain, comprehensive, or complete?

If it had been the intention of the Supreme Court to overrule the decision in Atchison, Topeka & Santa Fe R. R. Co. vs. Sullivan, 173 Fed., 456, would it not have said so expressly? That case was cited in the briefs, was before the court, and was not mentioned. The only explanation of this omission is that the Supreme Court did not intend to overrule the Sullivan case, and considered that the distinction between it

and the Singer case was too obvious to require comment.

If it had been the intention of the Supreme Court to reverse, or in any respect criticise, the process of reasoning by which the Circuit Court of Appeals arrived at its conclusion in the Singer case, would it not have said so expressly? This it did not do, but, on the contrary, affirmed this court's decision and called attention to an additional reason by which it was supported.

If it had been the intention of the Supreme Court to overrule the long line of its own previous decisions, to which we have adverted, would it not have said so; and would it not have made express mention of at least some of the prior decisions so overruled? This it did not do. On the contrary, the language and reasoning of the opinion and the authorities cited specifically uphold and reiterate the doctrine which demands the interposition of equity in the case at bar.

As has been recently stated, it is not at all the practice of the Supreme Court "to depart from its prior rulings, either lightly or *sub silentio.*"

Stuart vs. Union Pacific, 178 Fed., 753.

The foregoing observation was made by the same learned judge who later wrote the opinion of the Supreme Court in the Singer Sewing Machine case. If in the latter case Mr. Justice Van Devanter had intended to overrule prior decisions of the Supreme Court, it admits of no doubt that he would have done so expressly. Not having done so expressly, the conclusion is irresistible that he did not intend to do so at all.

We therefore respectfully submit that the decision of the Supreme Court in the Singer Sewing Machine case not only is not an authority supporting the opinion of the Circuit Court of Appeals in the present case, but, on the contrary, is in irreconcilable conflict therewith, and destroys the foundation upon which said opinion rests.

This is made manifest by its subsequent decisions.

Ohio Tax Cases, 232 U. S., 576, 587.

Johnson vs. Wells Fargo & Co., 239 U. S., 234, 244.

V.

EQUITY JURISDICTION IS HERE INVOKED UPON SEVERAL WELL-SETTLED AND WELL-SUSTAINED GROUNDS, SUCH AS WERE CLEARLY RECOGNIZED AND WOULD CERTAINLY HAVE UPHELD SUCH JURISDICTION IN THE HIGH COURT OF CHANCERY IN ENGLAND IN 1789. THE CONSTITUTION AND LAWS OF THE UNITED STATES FORBID THE RENUNCIATION OF SUCH JURISDICTION, WHATEVER BE THE PROVISIONS OF THE COLORADO STATUTE.

The Circuit Court of Appeals having held, as it did (217 Fed., 544), that the Colorado statute afforded a remedy which was exclusive, and not cumulative; that it was intended to, and did, oust the jurisdiction in equity in the federal as well as in the state courts;

that under such circumstances it does not "lie with the courts to say that the remedy which the legislature has provided is inadequate, and that the remedy which it has condemned shall therefore be continued;" that to do so "would be to make the law of no effect through the traditions of equity," and would "not only be judicial legislation, but would nullify a statute which is conceded to be constitutional;" that the statute "abolishes the right to stay the collection of public revenue by injunction," not only in the state, but also in the federal courts; that "the courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the one which it takes away," and that "the statute being constitutional, the judgment of the legislature on that subject must control," not only in the state courts, but also in the federal courts—having held all this, as the court expressly did, it is obvious that the court gave scant, if any, consideration to the several grounds of equity jurisdiction clearly alleged and fully sustained by the plaintiff. For, if the court's ruling be correct, those grounds, whatever they might be, could not avail against the state statute, as construed by the court.

Nevertheless, both by averment and proof, several well-settled and anciently recognized grounds of equity jurisdiction were made to appear.

1. Systematic, Continued, and Repeated Wrongful Discrimination in Assessment and the Application of an Illegal or Unconstitutional Principle of Assessment Which Is Held to Be at Least a Constructive Fraud, and Therefore within the Ancient Jurisdiction of Equity to Relieve Therefrom.

Such a situation is clearly alleged in the bill. The allegation is, we submit, amply supported by the proof.

Such a course of action as is here alleged and proved constitutes at least a constructive fraud. For this reason alone this case is within the jurisdiction of equity. Equity will relieve from the results thereof upon a principle analogous to that which supports equity jurisdiction in cases of repeated trespass. Upon such grounds as these the High Court of Chancery in 1789 would and should have intervened. Therefore, such conditions not only render the tax invalid, but require the interposition of equity. This is settled by repeated decisions, both of the Supreme Court and of the Circuit Court of Appeals.

A. T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, 471.

Ritterbusch vs. A. T. & S. F. Ry. Co., 198 Fed., 46.

Wells, Fargo & Co. vs. Johnson, 214 Fed., 180, 189.

Johnson vs. Wells, Fargo & Co., 239 U. S., 234, 244.

Cummings vs. Bank, 101 U. S., 153, 157, 158.

National Bank vs. Kimball, 103 U. S., 732, 733.

Poindexter vs. Greenhow, 114 U. S., 270, 295.

Stanley vs. Supervisors of Albany, 121 U. S., 535, 550, 551.

San Francisco National Bank vs. Dodge, 197 U. S., 70, 75, 81, 108, 109, 110.

Cooley on Taxation (3d ed.), Vol. 2, pp. 1459, 1460.

And in the foregoing cases jurisdiction in equity founded upon this ground has been upheld, notwithstanding the statute of Colorado here referred to, and also notwithstanding statutes of other states of like character, but much more comprehensive and complete. Thus, in A. T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, at 470, the court, speaking through His Honor, Judge Sanborn, said:

> "The systematic and intentional omission of watches, clocks and jewelry, credits and fat stock, by the county assessor from the assessment of the property within his jurisdiction, however innocent in actual intention, was either an intentional fraud upon the complainant or such a gross mistake that it was a fraud in law. * * * Not only this, but the omission of the fat stock and the credits had been repeated by the officials of this county year after year. It was their habitual practice to omit them, and this practice threatened to continue. It

had grown into a rule, and yet it was a violation of the constitution of the state, which requires that 'all taxes * * * shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal,' (Art. X, sec. 3) and of the statute which required all personal property not exempt to be assessed. It was systematic, intentional and continuing, and where there is a systematic, intentional, continuing omission or undervaluation of other taxable property by the taxing officers of a state or county, in violation of the constitution or law, which inevitably effects an unjust discrimination in taxation against the property of the complainant and against other property similarly situated, a bill in equity will lie to enjoin the collection of that portion of the tax which resulted from the illegal discrimination. (Citing many cases.) The facts of these cases bring it under this rule, and the decree below must be reversed."

This ruling was made in spite of the statute of Colorado here involved, which was expressly brought to the attention of, and considered by, this court. The facts in this regard involved in the Sullivan case are very similar to those involved in the case at bar, except that here, in our judgment, the facts more strongly demand the interposition of equity.

In Wells, Fargo & Co. vs. Johnson, 214 Fed., 180 (decided April 24, 1914), the court, speaking through His Honor, Judge Sanborn, said (p. 188):

> "Finally, counsel for the defendant argue, as we understand their brief, that, although the law under which the assessments were made is unconstitutional and the assessments and taxes are void, still the plaintiffs are entitled to no injunction against their collection * * *." (P. 189) "(3) Because the plaintiffs have an adequate remedy at law; but this is the second time this board has made in the same way unlawful assessments of the property of these plaintiffs, which effect an unjust and unconstitutional discrimination in taxation against them and their property. Its action has been systematic and repeated, and a systematic, repeated, continuing violation of the constitution or the law, to the injury of the plaintiff, like a continuing trespass, presents ample reason for an injunction against its continuance." (Citing A. T. & S. F. Ry. Co. vs. Sullivan, *supra*, and again citing the same list of authorities which had theretofore been cited in the Sullivan case, and which include Cummings vs. National Bank, *supra*, and many other cases cited in this brief.)

The foregoing decision was made in view and in spite of the right to pay the tax and recover it back in a suit at law, which was expressly noticed and

commented upon in that portion of the opinion which immediately followed. It has been fully affirmed.

Johnson vs. Wells, Fargo & Co., 239 U. S., 234, 243, 244.

In Cummings vs. National Bank, 101 U. S., 153, 157, 158, jurisdiction in equity was entertained upon this ground, "independently," as the court said, of a statute of Ohio which authorized relief by injunction in tax cases, and in spite of a statute of Ohio which gave full, complete, and adequate remedy at law by payment and action to recover back. This case has hereinbefore been fully reviewed.

In the present opinion the court seems to think that fraud of this nature, which will invoke the jurisdiction of equity, is of a very rare kind (which the court does not define), and that the Cummings decision was based upon the Ohio statute authorizing injunctions in tax cases. That the court is wrong in the second assumption we have hereinbefore, we hope, demonstrated. That the court was wrong in the first assumption is clearly demonstrated by the fact that it cited the Cummings case in support of equity jurisdiction under circumstances of like character, but less persuasive than those here presented (Wells, Fargo & Co. vs. Johnson, *supra*); that it did likewise in A. T. & S. F. Ry. Co. vs. Sullivan, *supra;* and that the Supreme Court of the United States has repeatedly done so in many cases where there was a total absence of a state statute authorizing injunctive relief, and in spite of a state statute affording an adequate remedy at law. The recent decision in San Francisco National Bank vs. Dodge (197 U. S., 70)

is an example. That case arose in California, where a state statute exists giving a most comprehensive remedy at law by payment under protest and action to recover back (197 U. S., 109). There is no statute in California authorizing resort to equity in tax cases. The suit was to enjoin the collection of the tax. Jurisdiction in equity was invoked and sustained upon the ground of systematic application of a wrong principle of assessment, resulting in unlawful discrimination. Cummings vs. National Bank, *supra*, was cited in support of such jurisdiction (197 U. S., 75), thus conclusively demonstrating that in the Cummings case equity jurisdiction had not been based upon the Ohio statute permitting injunctions. The following excerpt from the opinion indicates the nature of the ground upon which jurisdiction in equity was upheld and equitable and injunctive relief afforded (p. 81):

> "From this analysis it results that in the one case, that of national banks, not only the value of all the tangible property, but also the value of all the intangible elements above referred to, is assessed and taxed, whilst in the other case, that of state banks and other moneyed corporations, their property is taxed, but the intangible elements of value which we have indicated are not assessed and taxed, the consequence being to give rise to the discrimination against national banks and in favor of state banks and other moneyed corporations, forbidden by the act of Congress."

In the case at bar reliance is placed upon a like discrimination, created in a similar manner, and forbidden by the Constitution of the State of Colorado. In the San Francisco National Bank case, *supra,* the existence of the California statute and the remedy at law which it afforded were expressly brought to the attention of the court, and it was insisted that thereby jurisdiction in equity was ousted. This is evident from the vigorous dissenting opinion (179 U. S., 108 et seq.), in which the California statute is quoted at length. But by the majority opinion this contention was expressly negatived.

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2. Cloud on Title.

The bill alleges and the answer admits that plaintiff's property in Weld County, against which this tax is levied and from which it must be collected, consists largely of real estate—to-wit, a railroad, with its right-of-way, station buildings, and other appurtenances. The statute of Colorado (Rev. Stat. 1908, sec. 5530) expressly provides that taxes shall from the time of their levy be a perpetual lien upon real estate. Express provision is made for the sale of railroad property to satisfy delinquent taxes (Rev. Stat. 1908, secs. 5769, 5770, 5771, 5774, 5777) and the giving of a deed therefor, with apparently no right of redemption, which deed shall be *prima facie* evidence of the legality of the tax and the regularity of the proceedings (Rev. Stat., sec. 5730). Prior to sale the treasurer's books, the assessment rolls, and the tax war-

rants have the same legal and evidential effect (Rev. Stat. 1908, sec. 5535). Therefore the tax itself, being a lien, constitutes a cloud upon the title. The sale and the deed to follow will be additional clouds, and if, as is true here, the facts which render the tax invalid do not appear upon the face of the record, a perfect case is presented for relief in equity. One purpose of this suit is to remove and prevent such clouds upon the title to plaintiff's real estate. This is an ancient ground of equity jurisdiction. It prevailed in the High Court of Chancery in England in 1789. It became, therefore, a part of the permanent equity jurisdiction of federal courts. No state statute can lessen its effect. This is expressly held in McConihay vs. Wright, 121 U. S., 201, 205. It is likewise held in many of the other cases cited in the preceding pages. It has been repeatedly ruled that this ground alone will in tax cases sustain the equity jurisdiction of federal courts, notwithstanding the existence of a remedy at law given by a state statute analogous to that of Colorado, as construed by this court.

Dows vs. Chicago, 11 Wall., 108, 110.

U. P. Ry. Co. vs. Cheyenne, 113 U. S., 516, 525.

Allen vs. Baltimore & O., 114 U. S., 311, 313, 315.

Ogden City vs. Armstrong, 168 U. S., 224, 238.

Ohio Tax Cases, 232 U. S., 576, 587.

Taylor vs. Louisville & Nashville, 88 Fed., 350, 357, 358; certiorari denied, 172 U. S., 647.

Brown vs. French, 80 Fed., 166 168.

Huntington vs. R. R. Co., 2 Sawy., 503, 514; Fed. Cas. No. 6911.

Cooley on Taxation (3d ed.), Vol. 2, pp. 1449 et seq.

The court in the present opinion recognizes the force of these authorities, but states (217 Fed., 544):

> "Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted."

No cases are cited in support of this statement. We respectfully submit that none can be found. We further respectfully submit that the statement violates fundamental principles repeatedly declared and applied by the federal courts. The court's statement is wrong, because it violates the fundamental principle, clearly stated in National Surety Co. vs. State Bank, 120 Fed., 593, 603, and repeatedly enunciated both by the Circuit Court of Appeals and by the Supreme Court in other cases, that—

> "Unless changed by subsequent acts of congress, the adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States is that which existed when that jurisdiction was vested—

> that which was when the act of 1789 was adopted. * * * As there were no adequate remedies at law for a wrong of the character of that of which the appellants complain in 1789, and as the congress has since provided none, this case falls within the equitable jurisdiction of the Circuit Court and must be there heard, determined and relieved."

No one will claim that in 1789 there was a remedy at law to remove or prevent a cloud upon title.

But the assertion of the Circuit Court of Appeals is further wrong, because plaintiff's right in equity is now perfect and it is entitled to relief. It has no right at law, even under the Colorado statute, until it has paid the illegal and invalid tax. But it is under no obligation to pay an illegal tax. It is entitled, if it chooses, to stand upon its rights and protect its property by resisting the collection thereof, even though it be denied relief in equity. This right it cannot be deprived of by any state statute.

> Allen vs. Baltimore & O. R. R. Co., 114 U. S., 311.
>
> Wells, Fargo & Co. vs. Johnson, 214 Fed., 180, at 189.

It follows that the right to recover back the tax is not now in being, and may never exist. The court's dictum would require plaintiff to destroy a perfect existing right in equity, and to bring about a total change of conditions by the expenditure of

its money in payment of an illegal tax which it is under no obligation to pay, and thus *possibly* to create a legal right to recover that money back, which, until the instant of its payment, had no existence at all. We respectfully submit that this is violative of fundamental principles of equity jurisprudence.

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3. Prevention of Interference with Plaintiff's Duties as a Common Carrier, and Consequent Injury to the Public.

The bill expressly alleges that any attempt to collect this tax by the statutory methods would seriously interfere with the operation of plaintiff's railway, and consequently with the performance of its duties to the public as a common carrier, and to the United States as a carrier of mails. These allegations are not denied by the answer. Thereby a perfect ground of equity jurisdiction is presented without dispute, which has been fully recognized by the Supreme Court in like cases, and held to justify the interposition of equity, notwithstanding a state statute which afforded an adequate remedy at law.

Allen vs. Baltimore & O. R. R. Co., 114 U. S., 311, 313, 317.

Raymond vs. Chicago Union Traction Co., 207 U. S., 20, at 40.

4. Complicated Evidence and Involved Issues Requiring a Process Analogous to an Accounting, and the Machinery and Methods of a Court of Equity for Their Proper Consideration and Determination.

The jurisdiction of equity in matters of account is ancient. The ground of such jurisdiction was the difficulty, not to say impossibility, of submitting such issues to a jury in an action at law with any hope of a just result. The decisions of courts of equity, both English and American, have settled the doctrine that, even though no mutual accounting be required, nevertheless equity has jurisdiction if involved issues are presented to be solved upon complicated evidence, requiring the deliberate methods and trained investigators of a court of chancery to insure a just result. Whenever it appears that the evidence and the issues are such that in the hurry of a trial at law they could not be submitted to a jury without great likelihood of confusion, and except at the risk of hasty consideration and improper determination, equity will assume jurisdiction. In U. S. vs. Howland, 4 Wheat., 108, as early as 1819 Chief Justice Marshall, after referring to a statute of Massachusetts which gave a remedy at law, said (p. 114):

> "Still the remedy in chancery, where all parties may be brought before the court, is more complete and adequate, as the sum actually due may be there in such cases ascertained with more certainty and facility."

In Ex parte Young, 209 U. S., 123, 164, equity jurisdiction was expressly upheld upon the ground that proof of the facts necessary to show the invalidity of the state-made rates was so intricate and involved that it could not be produced before a jury with any hope of a just result; the court saying:

> "Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings within the state from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well, possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answer could only be given after a careful and prolonged examination of the whole evidence and the making of calculations based thereon. * * * From all these considerations it is plain that this is not a proper suit for investigation by a jury."

And so the court upheld jurisdiction in equity, although there was a remedy at law.

The observations of the Supreme Court quoted above are distinctly applicable to the case at bar. The issues are numerous, intricate, and involved. The evidence to sustain them is necessarily complicated, technical and voluminous. It admits of no

doubt that a jury in an action at law would be incompetent to deal with such questions and such evidence, and come to a just conclusion. The gist of this suit is unlawful discrimination in assessment. There are many subordinate issues. The evidence necessary to sustain the charge of discrimination and to show its illegality is necessarily extremely voluminous, complicated, and technical, and in many respects partakes of the nature of an accounting. Even upon the preliminary hearing, as the record discloses, many days were consumed in making the showing upon which the application for temporary injunction was submitted. A perusal of the record must convince that such evidence could not be submitted to a jury in a trial at law with any hope of a just or logical result. It need not be said that upon the final hearing the evidence will be still more voluminous and complicated, because then the showing must be complete. It admits of no doubt that upon this ground alone it was and is the duty of the court of equity to retain the bill, investigate the facts, and administer justice thereon according to the methods and practice of chancery. The Circuit Court of Appeals has under similar circumstances repeatedly so held.

Gunn vs. Brinkley Car Works Co. (C. C. A., 8th Cir.), 66 Fed., 382, 384.

Hayden vs. Thompson (C. C. A., 8th Cir.), 71 Fed., 60, 63.

McMullen Lumber Co. vs. Strother, 136 Fed., 295, 302.

Castle Creek Water Co. vs. City of Aspen (C. C. A., 8th Cir.), 146 Fed., 8, 14.

Butler Bros. Shoe Co. vs. U. S. Rubber Co. (C. C. A., 8th Cir.), 156 Fed., 1, 21.

Inhabitants of Cranford vs. Watters, 61 N. J. Eq., 284.

This was one of the ancient grounds of equity jurisdiction existent and recognized by the High Court of Chancery in 1789, as is evident from the English authorities collected in Inhabitants of Cranford vs. Watters, *supra*.

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5. Multiplicity of Suits.

The avoidance or prevention of a multiplicity of suits is a familiar branch of equity jurisdiction. It was a favorite ground upon which jurisdiction was entertained by the High Court of Chancery in England in 1789. It has frequently been applied to cases involving illegal taxation.

Dows vs. City of Chicago, 11 Wall., 108, 110, 112.

Union Pacific vs. Cheyenne, 113 U. S., 516, 525, 527.

Fargo vs. Hart, 193 U. S., 490, 503.

Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 39, 40.

As is demonstrated by the cases cited above and in the preceding pages hereof, this ground alone has frequently been held to be sufficient to sustain in tax

cases the equity jurisdiction of a federal court, notwithstanding the existence of a remedy at law given by a state statute. In the case at bar the bill avers that, if the taxes in dispute were paid by or collected from plaintiff, the county treasurer would immediately distribute the same to the County of Weld, to the State of Colorado, and to various school districts, cities, and towns in said county, from which it could never be recovered; and that, if plaintiff ever succeeded in recovering any portion thereof, it could only do so after expensive, long, and vexatious litigation and a multiplicity of suits. The evidence shows that the total amount of taxes claimed from plaintiff —to-wit, $77,818.41—is distributable as follows: to the State of Colorado, $10,598.18; to the County of Weld, $31,213.82; and the balance, amounting to $36,006.41, to thirteen cities and towns and fifty-two school districts, in various amounts as set forth in the exhibit. In making these collections, the treasurer acts as the agent of the county only in respect to the county's distributive share of the taxes. In respect to each minor municipal corporation and the distributive share thereof, he acts as its agent *pro hac vice*. It is the duty of the county treasurer immediately upon receipt of the amount of the tax to distribute it in the foregoing manner, and immediately remit the proper share to each of the distributees.

The correctness of all of this is conceded by the court in the present opinion, except our contention that a separate action must be brought for the recovery of the taxes against each of the separate municipal entities. On this point the court holds that the

statute of Colorado authorizes the recovery in a single suit against the board of county commissioners of all of the taxes, although the treasurer in collecting them did not act as the agent of the county or its board of commissioners, although the funds so collected neither actually nor constructively came into the possession or under the control of the county or its board of commissioners, and although said funds will have been all remitted to the various municipal entities by their agent and collector, the county treasurer, placed in their respective treasuries, and doubtless disbursed, before such a suit can be brought. The court remarks (217 Fed., 545) that "these difficulties are all of counsel's own creating." We respectfully submit, and shall presently undertake to demonstrate, that the court is wrong in its conclusion, and that it has assigned to the statute of Colorado a construction never placed thereon by the courts of the state. These considerations were advanced in good faith and supported by earnest argument in the original presentation of this case. Under such circumstances, we respectfully submit that the court's characterization of these contentions is undeserved.

The court may be wrong in its construction of this Colorado statute. We earnestly believe that it is. The state courts may hold—indeed, have held—otherwise. We are convinced that they must, if the statute is to be held constitutional. If this turns out to be so, then the necessity of a multiplicity of suits to recover back the tax is obvious.

But there is another view to take of this matter. Plaintiff is under no obligation to pay this tax, be-

cause it is illegal and invalid. The statute of Colorado referred to imposes no such obligation, and would be unconstitutional if it did. Such statute at the most merely affords an opportunity to pay the tax, and sue to recover it back, if plaintiff should elect to pursue that course. But, as we have previously pointed out, plaintiff may, if it chooses, stand upon its rights and resist the collection of the tax, even though denied relief in equity. But the treasurer and the sheriff of Weld County, as statutory collectors of these taxes, have the right to collect them by process of distraint. This they threaten to do, and will do, unless prevented by injunction. Plaintiff's property in Weld County consists not only of its track and road-bed, but of the engines, cars, and other rolling-stock which pass thereover, and other personal property used in the performance of its public duties. These the treasurer and the sheriff will seize and distrain unless enjoined. All this plainly appears from the allegations of the bill and the answer. Such a course would necessarily be followed by a multiplicity of suits. In every instance of seizure plaintiff, assuming the taxes to be invalid, would have its action at law of detinue or of replevin to reclaim the property, or of trespass for damages. Such process would be repeated indefinitely. It would interfere most seriously with the performance of plaintiff's public duties. It would subject it to repeated claims by its shippers and its passengers for delays in transit, and other inconvenience, damage, and consequent loss. All of this would be prevented if equity now retained jurisdiction and administered relief. But the court says (217 Fed., 545):

> "All these dangers as to multiplicity of suits were present in the case of Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, and in Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, and still the remedy provided by the statute was held to be plain, adequate and complete, so as to exclude a resort to equity."

Previously we have analyzed the foregoing decisions. In the Indiana case the statute and the state decisions made it clear beyond question that only one suit was required, and no independent ground of equity jurisdiction appeared. In the Colorado case the fact that it arose in, and related to, the peculiar consolidated municipal corporation known as the City and County of Denver made it clear that only one, at the most two, suits would be necessary. It has been said that one swallow does not make a summer. It is equally true that two suits do not make a multiplicity.

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6. Equity Can Afford Complete Relief.

But finally the court says (217 Fed., 545):

> "Finally, it is urged that the evidence has been taken and shows the taxes to be illegal, and plaintiff is therefore entitled to keep its money; that to compel it to pay the taxes and then bring an action to recover its money under the statute would not be as complete and speedy a remedy as a decree and injunction in this suit."

Thereupon the court proceeds to criticise this statement which it attributes to counsel. To the best of our recollection, we made no such statement, either in the briefs or in the oral argument, although we might properly have done so. The language and the thought thus criticised are the court's own, as set forth in its previous decisions.

A. T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, 470.

Wells, Fargo & Co. vs. Johnson, 214 Fed., 180, 189.

The language here criticised by the court is almost verbatim that which it employed in the Johnson case. It seems to us that these former decisions of the court enunciated sound doctrine. We believe that the language used and the thought expressed therein are not subject to just criticism. All of this is more fully discussed elsewhere. In any event, the court is not fair to itself when it criticises doctrines announced and expressions used in its former opinions, upon the mistaken assumption that they emanate from counsel.

We therefore deduce the conclusion that in the case at bar equity jurisdiction was invoked upon several well-settled and well-supported grounds, such as existed and were recognized in 1789 as part of the jurisdiction of the High Court of Chancery of England. It follows that these grounds of equity jurisdiction were written into, and became a permanent part of, the statutes of the United States prescribing the jurisdiction of federal courts, the same as though they had been expressly transcribed therein. They

have never since been changed by any act of Congress. The conclusion is, therefore, unavoidable that it is not only the privilege, but the duty, of a federal court of equity to entertain jurisdiction of a cause such as this, and that it may not renounce such jurisdiction, any more than a court of the United States may renounce its jurisdiction as a federal court of a case wherein diversity of citizenship exists and the necessary jurisdictional amount is involved.

VI.

EVEN IF THE ANCIENT AND WELL-SETTLED GROUNDS OF EQUITY JURISDICTION HERE PRESENTED WERE TOTALLY ABSENT, SUCH JURISDICTION WOULD STILL ATTACH, BECAUSE THE REMEDY, IF ANY, AFFORDED BY THE COLORADO STATUTE IS NOT ADEQUATE OR COMPLETE, NOR IS IT PLAIN OR CERTAIN.

We have previously demonstrated, we hope, that, inasmuch as this case falls within several well-settled and anciently recognized heads of equity jurisdiction, such jurisdiction must be exercised by the federal court, notwithstanding any state statute, whatever its provisions, or any state-given remedy, however adequate, complete, and comprehensive. We do not abate at all from that contention. But, even if that were not so, still equity would have jurisdiction of this cause.

It has been repeatedly held that the adequate remedy at law which will deprive a court of equity of

jurisdiction is a remedy *as* certain, *as* complete, *as* prompt, and *as* efficient to attain the ends of justice as the remedy in equity.

A. T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, 457.

Williams vs. Neely, 134 Fed., 1, 10.

Springfield Milling Co. vs. Barnard etc. Co., 81 Fed., 261, 265.

Brown vs. Arnold, 131 Fed., 723.

Wells, Fargo & Co. vs. Johnson, 214 Fed., 180, 189.

Boyce vs. Grundy, 3 Pet., 210, 215.

The certainty and completeness of the remedy at law is just as essential as its efficiency and ultimate adequacy. If there be a reasonable doubt as to the existence, the scope, the certainty, or the completeness of the remedy at law, equity will entertain jurisdiction.

In Kilborn vs. Sunderland, 130 U. S., 505, the Supreme Court held that equity jurisdiction may be invoked although there is a remedy at law, unless the remedy at law, *both in respect of the final relief and the mode of obtaining it*, is as efficient as the remedy in equity.

In Monmouth Investment Co. vs. Means, 151 Fed., 159, 165, 166, the court, with the citation of abundant authority, held that any doubt as to the efficacy of the remedy at law should be resolved in favor of the jurisdiction of the court of equity.

And in Davis vs. Wakelee, 156 U. S., 680, 688, the Supreme Court said:

> "Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

We respectfully submit that the court approached the consideration of the subject here under discussion from a radically wrong point of view. It applied a rule in conflict with the settled doctrine repeatedly enunciated in the decisions of the Supreme Court and in its own prior decisions. It held that because, as it conceived, the remedy in question had been provided by a state statute, which, by implication, made it exclusive, therefore it does not "lie with the courts to say that the remedy which the legislature has provided is inadequate, and that the remedy which it has condemned shall therefore be continued;" and that "the courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the remedy which it takes away;" and that "the judgment of the legislature upon that subject must control." Entertaining these views, it is not strange that the court held (217 Fed., 545):

> "We cannot, from speculative reasoning as to difficulties of accounting, hold that the aggrieved taxpayer will not receive in a single suit against the county the full compensation which the law provides."

In our previous briefs, and in our oral argument, we had pointed out the many difficulties, doubts, and uncertainties which beset the statutory remedy, even if it existed at all. It is evident that the court has swept aside these contentions, upon the doctrine—

which, we submit, is erroneous—not only that all doubts should be resolved against the jurisdiction of equity and in favor of the adequacy of the legal remedy, but that the mere fact that the supposed remedy is afforded by a statute of the state forecloses all inquiry as to its adequacy, certainty, or completeness. Sincerely believing that the court is wrong in this view, we venture to point out a few of the uncertainties, doubts, and manifest difficulties with which the statutory procedure is beset.

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1. The Statute, as Now Framed, Does Not Afford Any Right Which May Be Enforced by an Action at Law.

The court in its opinion quoted only a portion of this statute. We believe that the omitted part has an important bearing upon its proper construction. The statute was amended and re-enacted in 1902, and since that time has read as follows:

> "5750. *Counties responsible for state taxes.*—Section 223. Each county is responsible to the state for the full amount of tax levied for state purposes, excepting such amounts as are certified to be unavailable, double or erroneous assessments, as provided in this act, and in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to

improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer. (L. '02, p. 146, Sec. 202.)"

Rev. Stats., 1908, sec. 5750, p. 1357.

Prior to the commencement of this suit, the following statute became effective (Session Laws 1913, p. 528):

"Section 5. No abatement, rebate or refund of taxes shall be allowed by the county commissioners, unless a hearing shall be had thereon and a notice of such hearing and an opportunity to be present being first given to the assessor, and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado Tax Commission their findings, giving the amount of such abatement, rebate or refund, and their reasons therefor, and such abatement, rebate or refund shall become effective upon the endorsement thereon of the approval of the Colorado Tax Commission and in case the said Colorado Tax Commission shall disapprove the recommendations of the county commissioners, they shall endorse their disapproval thereon and return it to the county commissioners with a statement of their reasons therefor and no abatement, rebate or refund of taxes shall be allowed by the said

> board of county commissioners if the application is disapproved by the said Colorado Tax Commission."

The court will observe that the statute says nothing about an action at law or other procedure in court. It empowers the board of county commissioners to consider claims for tax refunds of county and state taxes only, and doubtless empowers them to make refund of such taxes if they shall be found by the county commissioners to be erroneous or illegal. The only right granted to the aggrieved taxpayer by this statute is a right to complain to the board of county commissioners. Neither by this statute nor by any other statute of Colorado is any provision made for a suit against the board of county commissioners, against the collecting officer, or against anyone else, for the recovery back of money paid on account of an invalid tax. There is no provision respecting payment under protest, retention of the fund until determination of the suit, or prompt bringing of the action, all of which were present in the Tennessee and Indiana statutes referred to by the court, but all of which are conspicuously absent from the Colorado statute. So far as the language of this statute is concerned, it gives no right which is enforceable in an action at law, or in any other form of legal proceeding. To the best of our knowledge, no court in Colorado has ever permitted a recovery against a board of county commissioners under this statute. We are confident that no such recovery has ever been permitted since the revision of the statute in 1902. We can affirm with positive conviction that in no case in Colorado has a

plaintiff been permitted to recover against a board of county commissioners of a county for moneys paid in discharge of city, town, or school district taxes. If any right exists in Colorado to recover back such tax in an action at law, it is not, and cannot be, based upon this statute. It must be the common-law right to recover back that which is exacted illegally and by duress. If so, it must be governed by the principles of the common law, and suit must be brought, and recovery must be had, not against the board of county commissioners of the county—except as to county, and possibly as to state, taxes—but against the respective municipal entities whose tax it was and by whose agent it was collected.

But by Section 5 of the act of 1913 quoted above, the power of the county commissioners to allow any abatement, rebate or refund of any taxes whatever was taken away. They were relieved of all duty in that regard, and it was provided that no such abatement, rebate or refund of such taxes should be allowed except upon the written approval of the State Tax Commission, to which all petitions for that purpose must be referred. As no method is provided by which the State Tax Commission can be required to approve, and no provision is made for appeal to the courts from a refusal to approve, it follows that the remedy, if any, heretofore provided by the statute, no longer exists. It also follows that it is now impossible to recover from the county any taxes alleged to have been erroneously or illegally collected, since the county, through its commissioners, is under no obligation and has no power to refund them. If the State Tax Commission refuses to permit a refund, it is not the fault

of the county commissioners of the county, and no cause of action against them arises because of such refusal. Against whom, then, should the suit be brought?

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2. Whatever Right Is Afforded by the Statute, It Does Not Relate to City, Town, and School District Taxes.

It will be observed that section 5750 consists of but one sentence. The subject dealt with, as shown by the title of the section, is "state taxes." The section makes each county responsible to the state for the full amount of taxes levied for state purposes, except such as are certified to be "unavailable, double or erroneous assessments," and as to these it gives the county commissioners the right to refund to the taxpayer. The general subject, and the first subject, referred to in the sentence which constitutes this section of the statute is "state taxes." By a well-settled canon of construction, commonly known as the doctrine of *ejusdem generis*, it is declared that where in a statute words of general follow words of particular import, the words of general import must be held to relate to such things as are within the class described by the words of particular import. This is especially true where, as here, the words occur in the same sentence.

Sutherland, Statutory Const., secs. 268-276.

It must, therefore, be that the provision of section 5750 relating to refunds applies only to the re-

funding of state taxes. And whether, by virtue of that section, a right to bring an action at law to recover was or was not conferred upon the taxpayer; and whatever right, if any, he obtained thereby, the subject dealt with, and the right, privilege, or authority conferred, was confined to state taxes, or, at most, to state and county taxes. Certainly it did not relate to city, town, or school district taxes, with which boards of county commissioners have nothing whatever to do. If the statute had purported to authorize boards of county commissioners to refund city, town, and school district taxes, and so, by implication, had authorized actions at law against them to recover the same, the statute would have been in conflict with the state Constitution. This point will be dealt with in the next succeeding section. But, if this be true, another canon of statutory construction becomes effective. It is not even necessary to declare that a certain construction of the statute would render it unconstitutional. It is sufficient if, under such construction, its validity would be doubtful. The settled rule under such circumstances is that if, by any possibility, the statute is subject to any construction which would avoid conflict, or possible conflict, with the Constitution, such construction must be adopted, even though it require a straining of the language employed.

Union Pacific vs. Louisville Stock Yards, 231 U. S., 190, 200.

United States vs. Delaware & Hudson Co., 213 U. S., 366, 408.

Harriman vs. Interstate Commerce Com., 211 U. S., 407.

Here no such strain is necessary. The natural and usual import of the words employed excludes city, town, and school district taxes from the operation of the statute. If it had been otherwise, the statute must have been declared invalid.

The statutes relating to the taxes of counties, cities, towns, and school districts will be fully reviewed in the next section. The conclusion is irresistible that, unless section 5750, Revised Statutes, validly can and plainly does give a right of action against the board of county commissioners to recover from the county moneys collected for taxes, retained and expended by cities, towns, and school districts, if there be any right to recover at law at all, it must be enforced by sixty-five separate actions against the numerous cities, towns, and school districts by which said tax will be collected and received. None of these can be in the federal court, because the amount involved in each will not permit. This alone would render them inadequate to oust the jurisdiction of a federal court of equity, without regard to their multiplicity. In the process of reasoning adopted by the court, the right of action at law against the board of county commissioners to recover the illegal tax collected arises from the provision that the board of county commissioners shall refund such tax. It must be surrounded by the same limitations. If the board of county commissioners may not refund taxes erroneously collected by cities, towns, or school districts within the county, they may not be sued because they have not made such refund. City, town, and school district taxes never come into the possession or under the control of the county or of its board of commis-

sioners. County taxes and state taxes do. County commissioners may refund county taxes because of their general control over county affairs. They may refund state taxes out of any state moneys on hand, and take credit therefor against the state, under the express provision of said section 5750. There are no such provisions relating to city, town, and school district taxes. There could not be, because neither the county nor the county commissioners ever have funds of cities, towns, or school districts in their possession or under their control, out of which to make such refunds. If they attempted to use county funds for such a purpose, they could be enjoined at the suit of any taxpayer in the county; for his money would be used to defray an obligation in which he had no interest. The Circuit Court of Appeals disposes of these objections by saying (217 Fed., 545):

> "These difficulties are all of counsel's own creating. * * * As to state taxes, there is an express provision giving to the county credit, in its accounting with the state, for any taxes that have been refunded. We have no doubt that the same remedy would apply as to municipalities, and that the county treasurer could take credit in his settlements made from time to time with them for their proportion of any sum which the county was compelled to pay as a refund. * * * We cannot, from speculative reasoning as to difficulties of accounting, hold that the aggrieved taxpayer will not receive in a single suit against the county the full compensation which the law provides."

It is not a mere matter of accounting, but an utter lack of power. The procedure suggested by the court would violate specific statutory and constitutional provisions.

In Morgan vs. Pueblo and Arkansas Valley R. R. Co., 6 Colo., 478, a like question was presented. Certain bonds, and the interest thereon, were to be paid by a special tax levy. The statute required the collectors to remit the funds so collected to the state treasurer, who was to pay the coupons upon these bonds, upon presentation. A certain holder of some of these coupons tendered them in payment of his general taxes, claiming that the county treasurer should give him credit therefor on the general taxes and take credit therefor in making remittances to the state treasurer of the funds arising from the special levy. But the court said (p. 481):

> "The county treasurer is not the disbursing officer of this fund. His whole power and duty respecting this special tax is to collect it and pay it over to the state treasurer, and holders of such coupons must apply to the latter officer for payment thereof. *It is not a question of bookkeeping, but of statute law, which is involved.* The doctrine of set-off or counter-claim does not obtain in revenue matters. With the exceptions specified in the statute, all taxes must be paid in money, and those entitled to receive funds raised by taxation must present their demands to the proper officer for payment. * * * If the special tax authorized by statute to be levied and assessed for the pay-

ment of these interest coupons as they mature, was in fact levied and collected, defendant in error has but to apply for their payment to the proper custodian of the fund; if such special tax has not been levied and assessed, the remedy is to proceed against the officers in default, to compel them to pay the tax, *but in no event can the taxes assessed and collected for county purposes be diverted to other purposes than those named in the statute.* 'To hold differently,' as said in Johnson vs. Howard and Trustee (41 Vt. 122), 'would open the way to supposable and probable complications that would tax professional and judicial wit to solve, to an extent that would not be likely to be compensated by any beneficial results that would be realized therefrom.'" (Italics ours.)

From the foregoing authority we deduce the conclusions: that the objection here presented is not a mere matter of accounting, as the Circuit Court of Appeals seems to think; that the county treasurer has the same relation to the funds which he collects under the special levies of cities, towns, and school districts as to those which arose under the special levy mentioned in the foregoing case; that his duty and sole authority in respect thereto is to remit said funds, as collected, to the various municipalities for which the collection was made; that these remittances must be made in money, and that, in the absence of statute authorizing the same, he cannot remit in receipts showing that he has used part of said money

to discharge an obligation of his principal; that county funds cannot, under any circumstances, be used to discharge obligations of cities, towns, or school districts.

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3. If the Statute Had Expressly Provided that the Board of County Commissioners Might Refund City, Town, and School District Taxes Erroneously or Illegally Collected, It Would Have Been Unconstitutional.

Article XI, section 1, of the Colorado Constitution expressly prohibits a county from lending or pledging its credit to, or in any manner, directly or indirectly, becoming responsible for, any debt, contract, or liability of any other public corporation. This includes municipal corporations such as cities, towns, and school districts.

In the State of California, prior to the adoption of the clear and comprehensive code referred to in San Francisco National Bank vs. Dodge, 197 U. S., 109, there existed a statute very similar in terms to said section 5750. The provisions of the Constitution and statutes of California relative to counties, cities, towns, and school districts are analogous to the corresponding provisions of the Colorado Constitution and statutes. In Pacific Mutual Life Ins. Co. vs. County of San Diego, 112 Cal., 314; 41 Pac., 423, a county was sued for taxes erroneously collected under a school district levy, but the court held that the suit could not be maintained, saying (p. 315):

"The funds of the school district are not subject to the control of the county so as to allow a reimbursement of the county for the amount of the judgment, if it should be paid (Const. art. XI, sec. 16; Pol. Code sec. 1837); and if said section 3819 of the Political Code admits of a construction which would uphold an action of this character, its constitutionality in that particular would admit of debate, for the credit of a county cannot be pledged for the payment of the liabilities of municipal or other corporations. (Const., art. IV, sec. 31.) But it was held in Elberg vs. San Luis Obispo County, decided in Department Two of this court, August 3, 1895, that said section 3819 of the Political Code was not designed to authorize the recovery from a county of illegal taxes collected for the use and disposition of a high school district within the county. This case differs from that in no particular favorable to plaintiff. (See, also, School Dist. v. Bridport, 63 Vt. 383; Stone v. Woodbury County, 51 Iowa, 522; Taylor v. Avon Tp., 73 Mich. 604.)"

See also:

Elberg vs. County of San Luis Obispo, 112 Cal., 316; 41 Pac., 475.

In Colorado, while the county treasurer acts as the collector of all property taxes, he is not the custodian of any of the funds thus realized, except as to those which accrue to the county. The state, the

county, the city, the town, and the school district each has its separate governmental organization; each is a separate entity; each holds and controls its own property and its own funds, independently of the others; and each has its own treasury and its own treasurer, who is the custodian of its moneys. The county treasurer, however, acts as collector of taxes for all of them (Rev. Stat. 1908, secs. 1436, 5672).

But as to state taxes, he must promptly remit to the state treasurer all sums of money collected for state purposes (Rev. Stat. 1908, secs. 5693, 5694, 5699), and thereupon such funds pass beyond his control, and likewise beyond the control of the board of county commissioners and other county officers.

As to the financial matters of counties, it is required that the levies for county purposes be specific and confined to certain objects named therein (Rev. Stat. 1908, sec. 1187). An annual appropriation is required, specifying the purposes for which expenditures are to be made during the year and the amount to be expended for each purpose (Rev. Stat. 1908, sec. 1215). Expenditures are strictly limited to the several purposes and the respective amounts named, and no liability can be incurred in excess of the appropriation (Rev. Stat. 1908, secs. 1216, 1217). The county treasurer is required to pro-rate the taxes collected to the several funds (Rev. Stat. 1908, sec. 5672). The moneys belonging to the county he must pay out on order of the board of county commissioners, and not otherwise (Rev. Stat. 1908, sec. 132). He is required to keep the separate funds specified in the appropriation bill and the levy distinct from one

another, and no warrants drawn on one fund can be paid out of a different fund (Rev. Stat., sec. 1324); and, in general, it may be stated that, as to county funds, he is not only the collector, but also the custodian thereof, and cannot pay them out except upon order of the board of county commissioners, and these orders are invalid unless within the appropriation for the year and upon a specific fund arising from a levy made for that purpose.

As to towns and cities, under the laws of Colorado these also are separate governmental entities, quite distinct from the state and from the county. They have power to levy and collect taxes. Each has its own treasurer, who is the custodian of its funds (Rev. Stat. 1908, sec. 6635). The city council or board of trustees of the town levies the tax (Rev. Stat. 1908, sec. 6652), which the county clerk is required to extend upon the tax list (Rev. Stat. 1908, sec. 6655). The county treasurer is required to collect the taxes arising from such levies, but cannot retain the same. He must promptly pay them over to the treasurer of the city or town (Rev. Stat. 1908, sec. 6657), and is to be compensated for his service in collecting by the city or town (Rev. Stat. 1908, sec. 6658). Cities and towns, like counties, are required to make an annual appropriation for specified purposes, which they may not under any circumstances exceed (Rev. Stat. 1908, secs. 6631, 6632), and the city or town treasurer is required to keep a separate account of each fund or appropriation.

School districts also are separate governmental entities, acting through their respective school boards. They fix the levies for the purpose of school taxes.

The county treasurer is required to collect the tax, place it to the credit of the proper district as fast as collected, and hold it subject to the order of the district board (Rev. Stat. 1908, secs. 5893, 5894, 5895). Under heavy penalty, the county treasurer is required to pay this money over to the respective school districts or disburse it upon their orders (Rev. Stat. 1908, secs. 5899, 1326, 5903). Each school district has its own treasurer, who is the custodian of its funds (Rev. Stat. 1908, secs. 5922, 5940).

From the foregoing analysis of the statutes it appears that each of these political subdivisions is independent of all others in financial matters. Each holds, controls, and disburses its own funds, which are separately kept, held, and accounted for, and none has any control whatsoever over the moneys or financial affairs of any of the others.

But the statute relied upon by the Circuit Court of Appeals provides that in case of payment of an illegal tax "the board of county commissioners shall refund the same, without abatement or discount, to the taxpayer." But the board of county commissioners had nothing whatever to do with, and no control over, the finances or the funds of any city, town, or school district in the County of Weld. The only moneys they controlled, and the only funds from which they could make a repayment, were the moneys and the funds of Weld County. But they certainly had no power or authority to disburse the funds of Weld County for the purpose of discharging an obligation of any city, town, or school district in said county.

But the taxes in dispute are not by any means all county taxes. Less than one-half thereof are county

taxes; less than one-seventh thereof are state taxes; and the balance, constituting nearly one-half of the total amount in dispute, is made up of the taxes of thirteen cities and towns and fifty-two school districts through which plaintiff's railroad line extends. The record shows this in detail. The complete autonomy and absolute independence of each of these political and municipal entities has been demonstrated. While by statute the county treasurer acts as the collector of taxes for all of them, he is *pro hac vice* the agent of each to collect its taxes, and not the agent of the county in respect to the collection of all of them, but only the agent of the county in respect to the collection of county taxes alone. Moreover, as we have already pointed out, he is required to account for and forthwith remit to each of his principals the taxes collected in its behalf.

How could we maintain a suit against the county for a tax collected, received, and retained by a town or a school district? How could we maintain a suit against one town or school district for a tax collected, received, and retained by another town or school district? How could we maintain a suit against the state at all; and, particularly, how could we maintain a suit against the state to recover taxes collected, received, and retained by a county, or by any town or school district within that county? And how could we maintain a suit against a county, even for the county taxes which it through its treasurer had collected, received, and retained, when, under the statute of the State of Colorado, the right of action, if any, arises only upon refusal of the board of county commissioners to refund the same upon request,

which must be followed by an appeal to the District Court of the state by the unsuccessful applicant, and when, by the statute of 1913 (Session Laws, Colo., 1913, p. 528, sec. 5), as we have already pointed out, the power of the county commissioners to allow any abatement, rebate, or refund of taxes in any case has been entirely taken away and the correlative duty of the county commissioners to make such refund in a proper case utterly destroyed? The duty, such as it was, no longer exists; therefore there can be no breach thereof. Where no duty or obligation exists, no cause of action can arise from failure or refusal to act. No suit can be successfully maintained by one who has no cause of action.

But if, by some miracle, we were able to maintain a suit at law against the county for the recovery of all of the disputed taxes, how could we enforce payment of the judgment? It is obvious that a general county tax, applicable to all of the property in the county, should not and could not be levied for the purpose of refunding illegal taxes, of which only a small part were county taxes and the major part consisted of taxes collected, received, and retained by thirteen of the towns and fifty-two of the school districts in the county.

But where in the statute is it at all contemplated or provided that a judgment against the county, in a suit to which neither the towns nor the school districts were or could be parties, can be paid by a tax levy ordered by the county commissioners and applicable only in certain towns and certain school districts? What authority have the county commissioners to levy a tax in any town or school district,

except in so far as a general county levy, applicable to all of the property in the county, applies *pro rata* to the property within such subdivisions? In truth, the county commissioners have and can have no such authority. Section 7 of Article X of the Colorado Constitution provides:

> "The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may by law vest *in the corporate authorities thereof respectively* the power to assess and collect taxes for all purposes of such corporations." (Italics ours.)

This constitutional provision not only plainly prohibits the General Assembly from itself attempting to levy any taxes for the purposes of any county, city, town, or school district, but likewise prohibits the General Assembly from attempting to confer authority so to do upon any subordinate agency, save only upon the corporate authorities of the particular subordinate municipal corporation or entity for whose purposes the tax is to be levied.

But the repayment by a county, a city, a town, or a school district of moneys illegally collected by such county, city, town, or school district, under the guise of taxation, and by it received and retained, is certainly, as to the refund which each makes, a county, city, town, or school district purpose, as the case may be. The statutes of Colorado enacted pursuant to the constitutional provision quoted above plainly authorize the corporate authorities of each of the subordinate municipal corporations mentioned above to

levy taxes for their respective purposes, and likewise plainly prohibit the corporate authorities of any of them to levy taxes for the purposes of any of the others. The decisions in Colorado make this clear beyond question.

Taxation of Mining Claims, 9 Colo., 635, 636.

Boston & Colorado Smelting Co. vs. Elder, 20 Colo. App., 96, 99.

People ex rel. vs. Commissioners, 12 Colo., 89, 92, 93.

In the case last cited the court says (p. 92):

"The defendants by their answer claim that according to section 7, Article X of the Constitution of this state and other provisions of the Constitution and laws enacted in pursuance thereof, the power to levy taxes for school districts cannot be vested in the board of county commissioners, but that the authority to levy must be vested in the board of education of the proper district, or the school district itself. * * * We have considered with care the several constitutional and statutory provisions referred to in defendants' answer, and are of opinion that inasmuch as the board of education of the proper district is vested with the *sole power* of determining and certifying to the board of commissioners the number of mills per dollar necessary to be levied for school purposes, while by the same act the commissioners are

> deprived of all discretion in the matter of such levy, that it is the board of education, and not the county commissioners, who really levy or cause the taxes to be levied. * * * Notwithstanding the letter of the statutes, it is manifest that in the matter of levying the taxes the board of commissioners act in a mere ministerial capacity as the agents of the state, and the board of education of the proper district is vested *with the sole discretionary power in the premises.*" (Italics ours.)

We therefore submit, with confidence, not only that the statutes do not authorize the board of county commissioners to refund taxes erroneously collected, received, and retained by cities, towns, and school districts, but that, under the Constitution of Colorado, no statute would be valid which attempted to confer such authority upon the county commissioners.

It follows that, if plaintiff must now pay the disputed taxes and rely upon actions at law to recover the same, a separate action must be brought against each city, each town, and each school district mentioned in the list appearing at pages 50 and 51 of the printed record. It also follows that every one of the sixty-five actions at law thus made necessary must be brought in the state courts, for in none of them would the amount involved be sufficient to authorize federal jurisdiction.

But a remedy available only in the state court is not an adequate remedy where the plaintiff, by reason of his citizenship, has the right to have the matter

determined in the federal court. It is an absence of this adequate remedy at law *in the federal courts*, and that alone, which conditions jurisdiction in equity in those courts. The fact that the party has a remedy at law in the state courts is not material.

Smyth vs. Ames, 169 U. S., 466, 516.

Arrowsmith vs. Gleason, 129 U. S., 86, 98.

Mayer vs. Fouldrod, Fed. Cas., No. 9341.

Bean vs. Smith, Fed. Cas., No. 1174.

Coler vs. Board, 89 Fed., 257.

United States Life Ins. Co. vs. Cable, 98 Fed., 761.

National Surety Co. vs. State Bank, 120 Fed., 593.

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4. No Such Suit Could Be Maintained Unless Payment Had Been Under Duress. Payment Under Protest Would Not Avail.

As noted, the Colorado statute makes no provision for payment under protest; indeed, it makes no provision whatever for suit to recover back. It has been expressly held in Colorado that payment of a tax before actual seizure and distraint of the property constitutes a voluntary payment, for which there can be no recovery back, even though the tax was illegally collected.

> "The fact that the property was advertised for sale in no manner affects the proposition, nor would this be taken as a legal

compulsion, preventing the application of the principle of voluntary payment. DeBaker vs. Cavillo, 52 Calif. 473; Bucknall vs. Story, 46 Calif. 495."

El Paso County vs. Colorado Springs Co., 15 Colo. App., 274, 280, 281.

Richardson vs. City of Denver, 17 Colo., 398.

In the last case cited the Colorado court cites and adopts the doctrine of the federal courts as expressed in—

Lamborn vs. County Commissioners, 97 U. S., 181.

Railroad vs. Commissioners, 98 U. S., 541.

See also:

Little vs. Bowers, 134 U. S., 547, 554.

These cases expressly hold that such a suit would fail unless the taxes were clearly paid under duress of distraint, seizure, and sale of plaintiff's property. If payment were made before such distraint, seizure, and sale, it would be voluntary and could never be recovered back, even though the taxes were found to be illegal. That payment was expressly made under protest would avail nothing.

In Colorado, taxes are to be paid in two instalments, on or before March 1 and August 1, respectively. After August 1 they are collectible by distraint, but tax sales do not occur until late in the autumn. Therefore, in order to avail himself of the

supposed remedy indicated by the court, the aggrieved taxpayer must wait until the late autumn and, when compelled so to do by the compulsion of sales or distraints, pay not only the amount of the original tax, but all of the enormous penalties, interest, and costs which would have since accrued.

In view of the nature of plaintiff's property and business, the cloud upon its title created by this tax, and the irreparable injury, both to the railroad and to the public, which would follow from any distraint, seizure, sale, or other interference with its property, plaintiff cannot, and in equity should not, be compelled to sit idly by and await such seizure. It is entitled to have its remedy in equity to prevent and forestall such seizure and sale.

Union Pacific vs. Cheyenne, 113 U. S., 516, 525.

Stanley vs. Supervisors, 121 U. S., 535, 550, 551.

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5. Even if, by Some Miracle, Plaintiff Succeeded in Maintaining Such a Suit and in Obtaining Judgment, Collection Thereof Could Not Be Enforced.

It must not be forgotten that the remedy at law which will oust the jurisdiction of equity must, both in respect of the final relief and the mode of obtaining it, be as efficient as the remedy in equity.

Kilborn vs. Sunderland, 130 U. S., 505.

If, by some miracle, we were able to maintain a suit against the county for the recovery after payment

of all of the disputed tax, how could we enforce collection of the judgment? It is obvious that a general county tax, applicable to all the property in the county, should not and could not be levied for the purpose of refunding illegal taxes, of which only a part were general taxes and the major part consisted of taxes collected, received, and retained by thirteen of the towns and fifty-two of the school districts in the county. The inhabitants of the other portion of the county would not be responsible therefor, and their property could not legally be burdened with a tax levied to pay the same. This the defendants recognize. For these reasons, and other reasons already pointed out, it would be wholly beyond the power of the board of county commissioners to raise the money necessary to satisfy the judgment.

But, passing this objection, how could plaintiff recover the money in case it eventually obtained judgment against this county? There is a provision of the statute for the issuance of judgment bonds by a county, with the proceeds of which judgments may be paid in case other funds are not available. But such bonds are to be voted by the people, and their issuance is dependent upon the will of the voters.

Rev. Stat. 1908, sec. 1380.

This statute, therefore, affords no relief.

Shapleigh vs. San Angelo, 167 U. S., 646, 657.

And another statute expressly provides that, when a judgment has been obtained against a county, no execution shall issue thereon, but the judgment may

be paid by a special tax levied for that purpose, the levy to be ordered by the board of county commissioners in its discretion; "provided, further, that the powers herein given to the board of county commissioners shall not be construed as requiring said board to levy any special tax to pay any judgment unless in its discretion the said board shall so determine."

Rev. Stat. 1908, sec. 1183.

Stryker vs. Board of Commissioners (C. C. A. 8th Cir.), 77 Fed., 567.

From which it appears that no effective method has been provided for the collection of such a judgment, even after it has been obtained, and even in the case of the county. The situation is still more difficult as to the cities, towns, and school districts. Moreover, the expense of the long litigation requisite in any event to the obtaining of such a judgment, and the subsequent enforcement of its payment, could never be recovered back. Such remedies as these, if they exist at all, certainly are not so speedy, adequate, complete, and efficient as to preclude a resort to equity.

Bank of Kentucky vs. Stone, 88 Fed., 383, 390.

Pyle vs. Brenneman (C. C. A. 4th Cir.), 122 Fed., 787.

6. *In Any Event, the Money, if Collected, either from the County, the Cities, the Towns, or the School Districts, Must Necessarily and in Large Measure Come from Plaintiff's Own Treasury; for It Must Be Raised by Taxation of Plaintiff's Property.*

Plaintiff is the largest taxpayer in Weld County. For each of the years 1910, 1911, and 1912 the assessed valuation of its property in the County of Weld has been approximately 12 per cent of the total assessed valuation of all of the property in the county. This is approximately the ratio constantly maintained. In the school districts and other minor municipal entities this percentage is largely increased. In some instances the Railroad Company pays more than half of the total taxes. In other counties of the state the ratio is even greater than in Weld County.

If plaintiff should pay this disputed tax, subsequently sue to recover back, actually maintain the suit, and recover judgment, such a judgment, if paid at all, would have to be paid out of funds realized from a general tax levy, bearing equally upon all property within the limits of the authority levying the tax. (Colo. Constitution, Art. X, Sec. 3; Rev. Stat. 1908, p. 44.) Therefore, if the judgment were against the county, plaintiff would be obliged to contribute to the extent of approximately 12 per cent to the payment of its own judgment. If the judgment were against some of the school districts involved, plaintiff would be obliged to pay half, and in some instances practically all, of its own judgment. The same would be true when the county demanded reimbursement from the minor municipalities. How

can it possibly be said that a remedy at law which merely affords to the plaintiff the privilege of taking his money out of one of his pockets and putting it into another, and which leaves his valid claim in fact unsatisfied, is as adequate or efficient as the remedy in equity?

The situation of the Union Pacific in this regard in Weld County finds its parallel in every other county of the state through which its railroad runs, and in some the conditions in this respect are much more aggravated and extreme. The same thing is true of every other railroad and large property-owner and taxpayer in every county of the state.

Much more might be said relative to the inefficiency and utter inadequacy of the remedy at law, even if it exists at all. What has been said surely should be sufficient to convince that that remedy is not *as* adequate, *as* efficient, *as* prompt, *as* certain, and *as* reliable as the remedy in equity which is here invoked. We therefore respectfully submit that, even though there had been a total absence of any of the recognized grounds of equity jurisdiction which by the terms of the Judiciary Act require the federal court of equity to entertain this suit, nevertheless such jurisdiction would have to attach, for the reasons hereinabove stated.

VII.

THE MOTION FOR PRELIMINARY INJUNCTION SHOULD HAVE BEEN GRANTED. THE ALLEGATIONS RELATIVE TO THE INVALIDITY OF THE TAX WERE AMPLY SUSTAINED BY THE PROOF.

Unquestionably the allegations of the bill make a case upon which the taxes complained of are invalid. By repeated decisions, this Court, and other Federal courts, have declared such discrimination as is here charged to be unlawful, and have relieved against the result thereof. Up to this point we have not commented specifically upon the evidence offered at the hearing upon the application for preliminary injunction in support of the allegations of the bill. It seems sufficient now to say that the showing was elaborate, ample and conclusive. The proper limits of a brief of this character will not permit an analysis of this proof. It seems to us in the present attitude of the case such analysis is unnecessary. As stated at the outset, the Circuit Court of Appeals decided the case without regard to the validity or invalidity of the tax. Plainly it would have dismissed the bill, whether the tax was valid or invalid. We are justified, therefore, in dealing with the question upon the assumption that the tax was conclusively shown to be invalid, as indeed it was. See Petition for Certiorari, paragraph 3.

The showing was sufficiently complete and convincing to entitle the Railroad Company to relief upon final hearing. But, of course, the cause was not upon

final hearing. The application was merely for a preliminary injunction, to maintain the *status quo* until the charges made could be thoroughly investigated and proper final relief administered after full hearing. The rules applicable to such a preliminary hearing have been many times stated, and are well understood. Upon the preliminary application it was neither the duty nor the right of the court to make findings upon the issues tendered; that could be done only after complete investigation, according to the deliberate methods of courts of equity, and a full and final hearing. Upon these issues of fact, the evidence at the hearing, to say the least, greatly preponderated in plaintiff's favor. It clearly indicated a condition of affairs which merited and required further and fuller investigation. We think it conclusively established the existence of the unlawful discrimination complained of, and to the extent claimed. It admits of no doubt, we think, that "substantial questions of law or fact, whose decision in favor of the moving party would entitle him to ultimate relief," were presented. This being true, why should not the preliminary injunction, to maintain the *status quo* until final hearing, be issued? In this aspect of the case, the applicable rule has been well settled and repeatedly enunciated.

> "But if the questions to be ultimately settled are serious and doubtful, and if the injury to the moving party will be certain, great and irreparable if the motion is denied, and the final decision is in his favor, while, if the decision is otherwise, the inconvenience and loss to the opposing party will be incon-

siderable, and may well be indemnified by a proper bond if the injunction is granted, *it is the duty of the chancellor to issue it.*" (Italics ours.)

Allison vs. Corson, 88 Fed., 581, 584.
St. Paul etc. Ry. Co. vs. Northern Pacific, 49 Fed., 306.
City of Newton vs. Levis, 79 Fed., 715, 718.
D. & R. G. vs. United States, 124 Fed., 156, 161.
Colorado Eastern vs. C. B. & Q., 141 Fed., 898, 900.
Harriman vs. Northern Securities Co., 132 Fed., 464.

That "the injury to the moving party will be certain, great and irreparable if the motion is denied" admits of no doubt. Suffice it to say, that a denial of the temporary injunction will, as defendants admit and aver, result in the immediate collection of the tax, which will at once terminate this particular suit, deprive the plaintiff of final hearing herein, render any final relief which could be afforded in this case quite nugatory, and drive the plaintiff to other supposed remedies, which it is sincerely believed do not exist at all, and which, if they have any existence, are doubtful, vague and elusive, involve a great multiplicity of suits, give no promise of a just result, and make it certain that plaintiff could never recover and collect the $31,000 and more here in dispute. In short, if the temporary injunction be denied, plain-

tiff's money will be gone, plaintiff will have been refused a hearing upon the question of illegality of the tax, and this suit will have been forthwith terminated. On the other hand, if the injunction is granted and the final decision be in favor of defendants, the inconvenience and loss to the defendants will be inconsiderable, and may well be indemnified by a proper bond. Plaintiff Railroad Company has already paid to the county treasurer $46,691.04, the amount of these taxes which it concedes to be due, and withholds $31,127.37, the amount which is illegal and excessive, if plaintiff's claim of discrimination be ultimately sustained. Plaintiff (petitioner here) was and is a perfectly solvent corporation. In addition, it is able and willing to give a bond, as it did upon the restraining order now in force, sufficient in amount and ample in security to insure the payment of the sum withheld in case the final decision should be against the plaintiff. There is, therefore, no possible chance of loss or even inconvenience to the defendants if the injunction be issued, even if the final decision be in their favor.

Moreover, by section 129 of the Judicial Code, plaintiff (petitioner here) is entitled as of right to an appeal from an order denying the application for preliminary injunction, and a review by an appellate court of the grounds upon which the application is put. So far, this right has been utterly denied it. The Circuit Court of Appeals did not at all pass upon the merit of its application for injunction. If, as we earnestly contend, the Circuit Court of Appeals was wrong in denying equity jurisdiction, then it is plain that petitioner has been and will be denied its statu-

tory right to a review by an appellate court of its application for preliminary injunction, unless this court now assumes jurisdiction thereof and considers and passes upon the same.

Not only this, but as matters have shaped themselves, the determination of the Circuit Court of Appeals against equity jurisdiction, if wrong, can never be reversed or reconsidered, and therefore the merit of the application for preliminary injunction will never receive the consideration of an appellate court, unless this court now assumes jurisdiction.

> Metropolitan Water Co. vs. Kaw Valley Drainage District, 223 U. S., 519, 520, 523, 524.
>
> Brown vs. Alton Water Co., 222 U. S., 325.

And finally, even though the determination of the Circuit Court of Appeals as to equity jurisdiction be not conclusive, but in some manner subject to subsequent review after final decree, it does not admit of doubt that unless this court now assumes jurisdiction the denial of preliminary injunctive relief will be effective, and long before final hearing and final decree can be had in the trial court the collecting officers will, by application of the drastic processes authorized and required by the Colorado statutes, have collected all of the taxes in dispute, thus rendering the case moot, and final relief nugatory, and subjecting petitioner (plaintiff below) to all of the wrongs from which it is here sought to be relieved. Such a situation would be intolerable, and, we think, abhorrent, to equity. It calls with a strong voice for

the immediate interposition of this court, which, we respectfully submit, should not be denied.

The force of this and like considerations was apparent to the learned trial judge. Moved by them, although he had denied the temporary injunction, he issued a restraining order, to remain in effect pending the appeal to the Circuit Court of Appeals. The latter court also, evidently moved by like considerations, although denying equity jurisdiction, and in effect directing dismissal of the bill, ordered that said restraining order remain in effect pending proceedings for review by this court.

Obviously, this was done upon the theory that under the Act of Congress plaintiff had a statutory right to appeal, which would have been rendered nugatory without the restraining order. But plaintiff (petitioner here) had at least as much right to a final hearing in the trial court, and an appeal from the final decree if it should be adverse. We respectfully submit that the very same considerations which moved the trial court to issue the restraining order mentioned above, and which moved the Circuit Court of Appeals to continue it in effect, require the issuance of the temporary injunction.

The very same situation was considered by the Circuit Court of Appeals in Allison vs. Corson, 88 Fed., 581. There the trial court denied the application for temporary injunction, but continued in effect a restraining order pending appeal from such denial. Upon that point the court, speaking through His Honor Judge Sanborn, said (page 584):

> "When the appeal was taken the court below properly continued the restraining or-

> der in force until the questions it presents could be decided by this court. The same considerations which led to this wise exercise of its discretion might well have induced that court to hold matters in statu quo, by the issue of the injunction, until a final hearing and decision of the case could be reached. No substantial loss or inconvenience would have been entailed upon the appellees by the allowance of the writ. Why, then, should not the injunction have been issued? Why should not the rights of these parties have been held where they were, without loss to any one, until the final hearing?"

The court answered the questions which it thus propounded by holding that the temporary injunction should have been issued, and by reversing the action of the trial court in refusing it. Why should not the same answers be made to the like questions propounded upon this record?

It is respectfully submitted that the writ of certiorari should be issued, that the decision of the Circuit Court of Appeals denying equity jurisdiction should be reversed, and that the case should be remanded to the trial court with directions to issue the preliminary injunction.

N. H. LOOMIS,
C. C. DORSEY,
Solicitors for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 431.

UNION PACIFIC RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO; W. R. PATTERSON, AS COUNTY TREASURER OF SAID COUNTY; AND S. J. MCAFEE, AS SHERIFF OF SAID COUNTY, RESPONDENTS.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

Petitioner, in recognition of the fact that the case at bar is one not reviewable upon appeal or by writ of error because of the provision of the judicial code, assuming that this cause is one of such gravity and inportance that it should be considered here by certiorari, has filed petition in that behalf with pretended purpose to preserve uniformity of decision of the Circuit Courts of Appeals and of said Courts with this Court and the Courts of Colorado.

CIRCUIT COURT OF APPEALS IS COURT OF LAST RESORT.

We respectfully contend that upon all questions here presented, the Circuit Court of Appeals of the United States is the Court of last resort and that the decision by it rendered, being in strict accord with the decisions of this Court, the Circuit Courts of Appeals and the Courts of Colorado, is conclusively; not reviewable upon appeal or by writ of error, and that there exists no reason for review of the decision by certiorari or otherwise.

That this Court is without jurisdiction to consider this cause upon appeal or error, as recognized by the application for certiorari, is manifest from the provisions of the Judicial Code and the declarations of this court in consideration of them, as we now proceed to demonstrate:

Section 128 of the Judicial Code provides:

> "The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts * * * in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court as provided in section two hundred thirty-eight, * * * and except as provided in sections two hundred thirty-nine and two hundred forty, the judgment and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent

entirely upon the opposite party to the suit or controversy, being * * * citizens of the different states." (36 Stat. L. 1133).

Section 238 describes cases in which appeals and writs of error may be taken to the Supreme Court direct and is exclusive of the class of cases to which this belongs.

Section 239 concerns only the certification of questions or propositions of law by the Circuit Court of Appeals unto this Court.

Section 240 empowers this Court to require by certiorari that the record in a case decided in any Circuit Court be brought here for review, in any case where the gravity or importance of the situation requires.

The case at bar in no manner involves a dispute or controversy affecting the construction of the constitution or laws of the United States.

This case is not one which under any of the sanctioned reasons therefor presents a cause for review by this Court under certiorari.

The writ of certiorari for review of the decisions of the Circuit Court of Appeals of causes which by the law are there to be finally determined, for manifest reasons, should be exercised only where necessity exists in order to conserve the policy of the law which brought these Appellate Courts into existence.

This Court has held that the power of the Court

by this supervisory review extends to every case pending in any Circuit Court of Appeals, provided the cause is one which, but for the statutory provision concerning certiorari would be finally determined in the Cirsuit Court of Appeals.

The Court has also held that while the power is as extensive as the necessity may be, and sufficient to accord to this Court final control over the litigation in all Courts of Appeals, it will be sparingly exercised, and indulged only when the circumstances of the case demonstrate that the importance of the question involved, or the necessity of preventing conflict between two or more Courts of Appeals, or Courts of Appeals and Courts of a State, or some matter effecting the interests of this Nation in its internal or external relations, demands the exercise of the power.

The principles by which this Court has been guided in the exercise of this supervisory control are well set forth in the opinion of Mr. Justice Brewer in Forsythe vs. Hammond, 166 U. S. 506, from which we excerpt the following language here pertinent:

> "This question of power has, indeed, already been decided by this Court in prior cases (American Const. Co. v. Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 383 (37; 486, 491); United States v. The Three Friends, 166 U. S. 1 (ante, 897), but as it has again been discussed by counsel, a brief reference to those cases and the reasons therein stated

may not be inappropriate. Up to the time of the passage of the act of 1891, creating the Circuit Courts of Appeal, the theory of Federal jurisprudence had been, a single Appellate Court, to-wit: the Supreme Court of the United States, by which a final review of all cases of which the lower Federal Courts had jurisdiction was to be made. It is true there existed certain limitations upon the right of appeal and review, based on the amount in controversy and other considerations; but such limitations did not recognize or provide for the existence of another Appellate Court, and did not conflict with the thought that this Court was to be the single tribunal for reviewing all cases and questions of a Federal nature. The rapid growth of the country and the enormous amount of litigation involving questions of a Federal character so added to the number of cases brought here for review that it was impossible for this Court to keep pace with the growing docket. The situation had become one of great peril, and many plans for relief were suggested and discussed.

The outcome was the act of March 3, 1891, (26 Stat. at L. 826, chap. 517) the thought of which was the creation in each of the nine circuits of an appellate tribunal composed of three judges, whose decision in

certain classes of cases appealable thereto should be final. McLish v. Roff, 141 U. S. 661, 666 (35:893, 895). While this division of appellate power was the means adopted to reduce the accumulation of business in this Court, it was foreseen that injurious results might follow if an absolute finality of determination was given to the Courts of Appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of Federal decision. As the Courts of Appeal would often be constituted of two Circuit Judges and one District Judge, a division of opinion between the former might result in a final judgment where the opinions of two Judges of equal rank were on each side of the questions involved. Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there * was placed in the act creating the Courts of Appeal, in addition to other provisions for review by this Court, this enactment:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The general language of this clause is noticeable. It applies to every case in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this Court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, and to exercise all the power and authority over it which this Court would have, in any case, brought to it by appeal or writ of error. Unquestionably, the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this Court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that Court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in

the Circuit Court of Appeals, and of those classes of cases in which the decision of that Court is declared a finality, and this Court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination. Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the Courts of Appeal. So exercised it might burden the docket of this Court with cases which it was the intent of Congress to terminate in the Courts of Appeal, and which, brought here, would simply prevent that promptness of decisions which in all judicial actions is one of the elements of justice.

So it has been that this Court, while not doubting its power, has been chary of action in respect to certioraris. It has said: * * *"It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked." Ex parte Lau Ow Bew, 141 U. S. 583, 587 (35: 868, 870); Ex parte Woods, 143 U. S. 202 (36:125); Lau Ow Bew v. United States,

144 U. S. 47, 58 (36:340, 344); American Const. Co. v. Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 383 (37:486, 491).

We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. Chicago & N. W. R. Co. v. Osbone, 146 U. S. 354 (36:1002). On the other hand, in United States v. The Three Friends, at the present term, 166 U. S. 1 (ante, 897), we issued a writ of certiorari in a case appealed to the Circuit Court of Appeals before any action had been taken by that Court; but this was in view of the fact that the question involved was one affecting the relation of this country to foreign nations, and therefore one whose prompt decision by this Court was of importance, not merely for the guidance of the executive department of the government, but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this.

We reaffirm in this case the propositions heretofore announced, to-wit: that the power of this Court in certiorari extends to every case pending in the Circuit Court of Appeal, and may be exercised at any time during such pendency, provided the case is one which

but for this provision of the statute would be finally determined in that Court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more Courts of Appeal, or between Courts of Appeal * and the Courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

The case at bar is one wherein the jurisdiction of the Federal Courts is dependent solely upon the fact of diversity of citizenship, the plaintiff being a corporation of the State of Utah, and the defendants officials of Weld County in the State of Colorado; and although in the bill it is contended that by inequality of tax burden impressed upon property of the petitioner as compared with that imposed upon others in Weld County for the year 1912, the petitioner, if compelled to pay the taxes levied under the assessment fixed, would be deprived of that uniformity of tax burden guaranteed by the constitution of Colorado, and deprived of its property without legal process and denied the equal protection of the law, as guaranteed by the federal constitution, no question concerning the con-

struction of either constitution or any of the provisions thereof was raised.

We, therefore, respectfully maintain that the decision of the Circuit Court of Appeals is not reviewable by this Court on writ of error, or by appeal, nor should it be disturbed by certiorari unless such review be necessary because of the existence of some one of the extraordinary and important reasons announced by Mr. Justice Brewer above set forth, none of which are present.

The sole ground of petitioner, urged to the Court, to review by certiorari this final decision of the Circuit Court of Appeals, is that the decision is in conflict with the judicial announcements made by Circuit Courts of Appeal other than that of the Eighth Circuit, the decisions of this Court and of the Courts of Colorado, and, as incidental thereto, that the decision is destructive of the equity jurisdiction of the Courts of the United States.

In support of this contention counsel for petitioner assert a false premise, and therefrom, by extended argument, lead to an erroneous conclusion, the fallacy of which is at once apparent upon consideration of the facts and law before the Trial Court, and the decision upon the law of the case announced by the Circuit Court of Appeals.

STATEMENT OF CASE.

The case was heard on application for a tempor-

ary writ of injunction, at the conclusion of which defendants moved a dismissal of the bill upon the grounds:

1st: That there was adequate remedy at law; and

2nd: That even if there was no adequate legal remedy and hence jurisdiction in equity, all of the allegations and assertions of pleading and evidence had been met and overcome and that the motion to deny the application for injunction was rightly sustained.

The Trial Court made extended comment upon the fact that for redress of the alleged grievances there was a remedy at law, complete, speedy and adequate; and indulged extended comment upon the failure of the plaintiff by its evidence to sustain the allegations of the bill or to produce such evidence as to entitle it even to a temporary writ; and this in face of the fact that counsel for petitioner at beginning of the hearing desired and offered to stipulate that the evidence there adduced should be considered as the evidence on the trial.

Upon all the pleadings, voluminous testimony and extended arguments, on botn points the Court sustained the defendants and dismissed the bill.

It was expressly declared that though alleged, no fraud was shown, but that contrary to the allegations of bill and the evidence introduced, the property of Weld County locally assessed was appraised at a value proportionately equal to that placed upon the property of the plaintiff.

In short, it was found, and expressly declared by the Trial Court not only that the bill should be dismissed for failure of allegation and proof of sufficient facts to entitle relief, but also because, even had sufficient facts been proved, and all the allegations of the bill been sustained, still for the alleged grievances by the plaintiff described there existed a plain, speedy and adequate remedy at law.

That the decision of the Trial Court was based both upon the failure of the plaintiff to sufficiently establish the allegations of its bill over the denial and rebutting testimony of the defendants, as well as upon the law, is manifest, for the Court sat for more than ten days in hearing evidence and argument upon both law and fact, and at the close denied the application for the injunctive writ.

At the conclusion of the trial there was no ruling that the allegations of this bill were sufficient, or that they had been sustained by proof; but upon the contrary the bill and evidence were both challenged by the motion of the defendants directed against the showing of fact, as well as the jurisdiction of the Court. Both contentions were sustained.

The decision of the Trial Court for the defendants upon both the facts and the law was taken for review by appeal before the Circuit Court of Appeals and there sustained upon the law alone, upon the ground that, as there was a full, speedy and adequate remedy at law, the equity jurisdiction of the Court could not be invoked; and this left no necessity for comment up-

on the fact that even though the Court could have found there was jurisdiction in equity, the plaintiff had failed in the establishment of the allegations of its bill.

The decision of the Circuit Court of Appeals as announced in the original opinion and upon the application for re-hearing, is not in conflict with the decisions of that Court, or any of the Circuit Courts of Appeals of the United States, nor with the decisions of this Court, or the Supreme Court of Colorado; but upon the contrary the decision is in consonance with decisions of all said Courts; and any decision upon a state of facts at bar other than that rendered, would be in flagrant violation thereof.

The decision of the Circuit Court of Appeals in the case at bar in no manner destroys or even effects the equity jusrisdiction of the Courts of the United States, or of the States, nor does it hold that the remedy afforded an aggrieved taxpayer in Colorado for the preservation of his rights against illegal tax exaction by a suit at law is conclusive.

This decision simply holds that Section 5750 of the Revised Statutes of Colorado, 1908, affords to an aggrieved taxpayer a remedy in the form of a right of recovery of any tax, or part of a tax erroneously exacted or illegally compelled to be paid in and by one action at law, which under circumstances such as here extant offers full, speedy and adequate relief.

The Colorado statute is a part of the machinery designed by the state for the collection of the revenues

necessary to its very existence and is peculiarly within its legislative power.

That the statute is constitutional is unquestioned. It affords a remedy for aggrieved taxpayers by one suit at law. In all cases where the relief so afforded is full, speedy and adequate there is no equity jurisdiction either in the Courts of Colorado or of the United States.

Equity follows the law. No principle of equity is by the statutory remedy affected.

It admits of equity where equity is necessary to full relief and denies it otherwise. The existence of the remedy has simply destroyed the necessity of a resort to equity which, without it, would of course, in many instances, exist. This has been the rule in Colorado and her Courts for more than forty years. It is the rule in the Courts of the United States. It has been repeatedly announced by the Courts of the State and of the federal jurisdiction, and must be preserved and applied unto all litigants, and in all cases, whether in contests before state or federal tribunals, in order to preserve that uniformity of decision and justice so sacred to our jurisprudence.

The contention that the legislation of Colorado affording taxpayers relief at law by one suit for recovery of illegal tax exaction can be annulled by the designer of the equity bill by allegations of cloud on title, multiplicity of suits and fraud, were all argued before the Trial Court, in the Circuit Court of Appeals, and on the application for rehearing, and though still asserted, we confidently maintain were rightly determined to be

without force, either in reason or judicial authority,—as shown in the long line of decisions of the Colorado Courts, consistently adhering to the doctrine established by its legislation and sanctioned and approved by the appellate tribunals of the United States.

The opinion of the Circuit Court of Appeals is frought with no erroneous declarations concerning the issues at bar, and the principle announced and conclusions reached are sustained by the law of the case which we proceed to demonstrate.

OPINION OF THE COURT OF APPEALS ANALYZED.

Statement of Issues.

1. In the first paragraph of the opinion is set forth a statement of the issues; that the application for temporary injunction was heard upon the bill, answer, affidavits and a large volume of oral testimony, and denied; that the appeal is to review this order, and that the Trial Court based its decision upon Section 5750 of the Revised Statutes of Colorado.

This is correct, except that in addition to the Trial Court denying the application for temporary injunction upon the provisions of Section 5750, it also decided that the plaintiff had not shown by pleading or proof that it had been wronged, or that it was entitled to any relief.

As the Court of Appeals sustained the conclusions of the Trial Court as to the law, which is decisive of the case, in a manner showing the Court had no jurisdiction, there was and is no need of mention in the opinion or the findings of the Trial Court concerning the lack of evidence of the plaintiff in its failure to establish any inequalities of tax burden alleged as the basis of its complaint.

Section 5750 Held Sufficient by Trial Court.

2. In the second paragraph the Court says, that following the decision in Singer Sewing Machine Company v. Benedict, the Trial Court Held that Section 5750 affords a complete and exclusive remedy for the wrongs *here* complained of, and that the appeal raised two questions:

"1. Has the statute been repealed as to the tax levy of 1912?

"2. If the statute applies to the taxes of 1912 does it afford an adequate remedy?"

The above is a correct statement. Certainly the Court followed the authority of the Singer Sewing Machine case and held, as at the trial it was expressly declared, that Section 5750 afforded a complete and the only remedy for the wrongs complained of in the bill. In other words, that Court held that in view of the allegations of this bill and the proof offered in its support there existed before the commencement of the

action, under the statutes of Colorado, a plain, speedy and adequate remedy at law.

It follows, therefore, there being at law such an adequate remedy, there was no occasion for the plaintiff's resort to equity. Plaintiff had no reason to invoke equity. There was no equity jurisdiction because of the existence of the legal remedy and therefore the legal remedy in this instance was the only remedy. This remedy was by the Trial Court found and held to be complete and exclusive, for the plaintiff, for the wrongs here complained of; and justly so, for, if the statute afforded adequate remedy under the set of circumstances described in the bill, of course it was exclusive.

Counsel for plaintiff attempt to contort this declaration into a holding by the Court of Appeals that under no condition or combination of circumstances could equity intervene by injunction to restrain collection of taxes in Colorado, and therefrom to deduce that the Court nullified the equity jurisdiction of the Courts of the United States.

The premise is wrong and the reasoning fallacious.

The Court did not hold that under no circumstances could equity intervene, nor do we contend that such is the law.

The assumption in this regard as to the holding of the Court is counsel created an dthereafter assailed.

On page two of its brief petitioner says:

"The Court's decision is tantamount to

> the declaration that in the State of Colorado, as well as in every other state having a statute similar to that of Colorado, as the same is construed by the Court, no case involving relief from an invalid tax can be entertained by a Court of equity, and under no imaginable set of circumstances can an injunction be issued to prohibit the collection of such an invalid tax."

This assertion is absolutely untrue, the Court does not, in the paragraph cited, or at all in the opinion, say that either the Trial Court held, or that it holds that the legal remedy is exclusive in all cases under statutes similar to that of Colorado.

If the statute in any state is sufficient under the circumstances set forth in the bill to afford to the plaintiff a plain, speedy and adequate remedy at law, there is no equitable resort.

The equity jurisdiction of the Federal Court is not affected, but it is only where there exists a combination of circumstances under which the litigant cannot obtain relief at law for the wrongs complained of, that this jurisdiction can be invoked for the preservation of his rights.

Section 5750 Not Repealed by Act of 1913 and Applies to 1912 Taxes.

3. In the third and fourth paragraphs of the opinion it is held that Section 5750 was not repealed

by Section 5 of Chapter 134 of the Session Laws of 1913, and in the fifth paragraph the Court declares that even if Section 5 had repealed 5750, it did not and could not have applied to the taxes of 1912.

These declarations are clearly correct, both from the laws of Colorado and abundant authority, and as is clearly apparent for the petitioner finds no fault with this portion of the Court's decision.

Section 5750 Affords Relief.

4. At the beginning of the sixth paragraph of the opinion the Court holds that the remedy at law afforded by 5750 is adequate and cites a few of the many authorities by which that conclusion is sustained.

The language of the Court is as follows:

> "Is the remedy given by Section 5750 adequate. It is difficult to follow the reasoning that will hold that it is not adequate. The evil caused by suits in equity to restrain the collection of taxes is grave and has often been set forth by Courts. Dows v. Chicago, 11 Wall., 108, 112; State Railroad Tax Cases, 92 U. S. 575; Indiana Manutacturing Co. v. Koehne, 188 U. S. 681; Boise Artesian Water Co. v. Boise City, 213 U. S. 276."

By what course of sound reasoning could it be said that the remedy afforded by 5750 fails to accord a plaintiff a plain, speedy and adequate remedy?

The aggrieved taxpayer may apply to the taxing officers and board upon whom by law is imposed the duty of the levy, assessments and equalization of the taxes for the very purpose of adjusting any non-equality so that the tax burdens necessary to sustain the state and upon which it must rely for its perpetuity, shall burden equally in conformity with the state and federal constitution.

It is not to be presumed that these officers and boards, chosen because of their ability, and clothed with power to accomplish this benign purpose of justice between all payers of tax, will fail in their duty, but every presumption of the law is in favor of the rightful assumption and discharge of this trust.

It is the presumption of the law that all payers of tax who lay before these bodies a plaint that is founded in justice, will receive a righteous decision on the cause presented and this at the hands of the constituted authority, chosen because of its ability, and imbued with the duty, with integrity to adjust the alleged wrong according to its merits, whereby there is obviated all necessity of a resort to proceedings in Court.

The laws of Colorado, however, do not end with this hearing and this adjustment, but one who is aggrieved, after application and refusal of adjustment has the right to resort to the Courts of law for recovery in one suit, of any part of a tax paid, which from any cause is invalid or illegal.

Where there is a diversity of citizenship and the

amount involved is sufficient, the Courts of the United States are open for litigants who have the right to resort thereto as an impartial forum to enforce their rights in one suit at law; and in any case where, because of the peculiarity of the circumstances, the legal remedy will not afford an adequate relief, resort may be had to equity; but in all cases and in every Court Section 5750 R. S. of Colorado affords a full, speedy and adequate relief unless there exists some peculiar combination of circumstances which renders the statute incompetent of its purpose.

Thus we see that within the taxing machinery of Colorado there is ample provision for the protection of every payer of tax resident and non-resident alike, with legal guaranties that the fundamental principles of its constitution commanding uniformity of burden shall be assured and at the same time that the state shall not be hampered or embarrassed in its necessary tax collections by interference under the pretense of equity, or otherwise, except conformable to the uniformity of method prescribed by the taxing power, designed for all and adopted to secure uniformity of burden, upon uniformity of value.

The grave evil mentioned by the Court of Appeals caused by suits in equity to restrain collection of public revenue, has been declared in almost countless proceedings before judicial tribunals, and nowhere more clearly than by the Supreme Court of the United States:

In Dows v. Chicago, 11 Wall. 108, 112, it is said:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the mode adopted to enforce the taxes levied should be interferred with as little as possible. Any delay in the proceedings of the officers, upon whom the duty is involved of collecting the taxes, may derange the operations of government, and thereby cause serious detriment to the public."

In State Railroad Tax Cases, 92 U. S. 575, a leading case in the United States tribunals, the same principle is announced at page 613 in the language of Mr. Justice Miller, as follows:

> "That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1897, that 'no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any Court.' Rev. Stat. Sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if Courts of justice could, *in any case*, interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from

> the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to Courts of justice. See Cheatham v. Norvell, decided at this term; Nickoll v. United States, 7 Wall. 122; Dows v. Chicago, 11 Wall. 108."

The recognition of this principle, and for prevention of the grave evils emanating from interference with the taxing power, under the guise of equity, Colorado adopted Section 5750 as a part of its taxing system, and retained it for more than forty years, and its Courts never questioning its constitutionality, consistently and continuously upholding its purpose have been in strict accord with the Courts of the United States, in some instances accepting and approving the very language of these tribunals in upholding the law.

Section 5750 Adopted for Purpose of Relief.

5. The Court in its opinion says:

> "To correct this evil, statutes of similar import to Section 5750 have been passed in many of the States of the Union. The highest Court of Colorado has frequently declared the correction of this evil to have been the object

of its statute. *Board of Commissioners of Bent Co. v. Atchison, T. & S. F. Ry. Co., 125 Pac., 528."*

That this is true from the many cases decided by the Colorado Courts of last resort we cite the following in which the above doctrine has been in different manner expounded:

Board of County Commissioners of Bent County v. Atchison T. & S. F. Ry. Co., 52 Colo. 609-612; 125 Pac. 528.

Woodward v. Elsworth, 4 Colo. 580.
Price v. Kramer, 4 Colo. 540.
People v. District Court, 29 Colo. 202.
Insurance Co. v. Bonner, 24 Colo. 223.
Hallett v. Arapahoe County, 40 Colo. 308.
Wason v. Major, 10 Colo. App. 183.
Walsh v. Sprankle, 21 C. A. 131.

In Commissioners of Bent County v. A. T. & S. F. Ry. Co., *supra*, at page 612, Mr. Justice White says:

"Public interest, judicial announcement, and, in this state, statutory enactment, are opposed to injunctive interference in the collection of public revenue. *State Railroad Tax Cases, 92 U. S. 575, 613, 614; Dows v. City of Chicago, 11 Wall. 108; Hannewinkle v. Georgetown, 15 Wall. 547; City of Highlands v. Johnson, 24 Colo. 371; Woodward v. Ellsworth, 4 Colo. 580; Price v. Kramer, Idem.*

546; Ins. Co. of No. Amer. v. Bonner, 7 Colo. App. 97, Section 5750, R. S.

"The policy of non-interference by the Courts with the process of collecting the taxes on which the state depends for its continued existence, 'is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to Courts of justice.' State Railroad Tax Cases, *supra*."

In Wason v. Major, 10 Colo. App., at page 183, the Court has this to say:

"State, county, and municipal governments can be carried on only from the revenues derived from taxation, and it would certainly be contrary to every principle of public policy to permit their important powers to be impaired, or their machinery wholly stopped, except from very grave and serious cause. As well and forcibly said by the distinguished Judge Cooley, 'but the personal consequences are not the only ones which should be kept in view of these cases. When the illegalities complained of affect only the person complaining, an injunction

which restrains proceedings as to him may cause no considerable mischief, and may very properly be awarded if a sufficient case is made out; but when they affect the whole tax levy, as they often do, a Court should be extremely cautious in awarding on the complaint of one person, or even of several, a process which may reach the cases of others not complaining, and which may seriously embarrass all the operations of the government depending on the source of revenue, which by means of it would be stopped. Courts have frequently remarked upon the impossibility of the government calculating with any certainty upon its revenues, if the collection of taxes was subject to be arrested in every instance in which a taxpayer or tax collector could make out prima facie a technical case for arresting such action; and it is justly said to be much better to let an individual pay to the government the demands it makes upon him, and if he considers them wholly or in part illegal, apply for the refunding of the money with interest afterwards.' Cooley on Taxation, 726."

In People v. District Court, 29 Colo., at page 202, Judge Steele says:

"Assuming everything they allege as invoking the aid of equity to be true and estab-

lished,—the multiplicity of suits to be avoided, the wholly inadequate remedy at law, the cloud upon their title, the irreparable damage,—*overshadowing all these reasons for granting the writ is the damage, the injury, the mischief, the wrong, the injustice which must result to Colorado and to her people if the injunction is permitted to stand.*" (Italics ours.)

In Insurance Co. v. Bonner, 24 Colo. 223, the Court says:

> "In addition to what is said by the Court of Appeals, we may say that Courts discourage the practice of granting injunctions to restrain the collection of the public revenue."

And in Walsh v. Sprankle, 21 Colo. App. 131, Judge Scott says:

> "Again, it is settled in this jurisdiction that injunctions to restrain the collection of public revenues are not favored."

That this evil of injunctive interference with tax collection upon which the state must depend for its continued existence, is not fancy but fact, is demonstrated by the effort to infuse it into Colorado practice to that extent that it is becoming a common nuisance and public menace, made apparent by the declaration

in plaintiff's brief that there are now pending in the Colorado Courts a number of cases under which, under the guise of equity, there is endeavor to interfere with the taxing power.

Counsel, at page 4, of their brief, say:

> "There are now pending in the District Court of the United States for the District of Colorado, on the equity side thereof, a number of cases involving alleged illegal taxes to a very large amount and presenting the same question which has been here determined.
>
> "There are now pending in the various Trial Courts of the State of Colorado a considerable number of such cases."

From the foregoing authorities it is clear that in Colorado there has been enacted a statute which is intended to afford relief to any aggrieved tax payer for taxes erroneously exacted or paid in one suit at law.

This is a right given and designed for all litigants in all Courts and in all cases no matter what the amount involved or the residence or citizenship of the claimant.

The right of action is one substantial to the aggrieved and is and must rest upon the same principles whether to be enforced in the State Courts or of the United States.

It is not a right to be enforced in equity in one

forum and at law in another. It is a right to be enforced in one suit at law. And until a case arises where the law is inadequate there is no question of equity jurisdiction. And in all cases where this question does arise the question must be answered whether in State or Federal Court by determination of whether or not under the circumstances there extant, the statute will afford a sufficient relief.

The methods of levy, assessment, equalization and collection of public revenue are reposed in the legislative authority of every state, subject only to those restrictions of the federal constitution requiring uniformity of burden, and these methods are a part of the sovereign power of the state, including the correction of errors and adjusting of inequalities, and though the proceedings may differ in different states the policy of permitting or preventing injunctive interference with the taxing machinery is solely within the legislative power.

The state *may not* define or limit the equity jurisdiction of the Federal Courts, but it may permit or prevent equitable interference with its taxing power, except in those instances where because of circumstances equity offers the only relief.

Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, 485, 486.

Payne v. Hook, 7 Wall. 425, 430.
Whitehead v. Shattuck, 138 U. S. 146.

Smythe v. Ames, 169 U. S. 466, 516.

Constitutionality of Section 5750 Not Questioned.

6. The Court of Appeals in its opinion then proceeds:

> "The statute is not attacked upon the ground that it is unconstitutional, nor could such an attack, if made, be sustained. The law is, therefore, valid legislation. It was not intended to be cumulative. Its object was to give an action at law for the recovery of sums paid on account of invalid taxes in place of a suit in equity to restrain their collection. Under such circumstances does it lie with the Courts to say, that the remedy which the legislature has provided is inadequate, and that the remedy which it has condemned shall, therefore, be continued? This would be to make the law of no effect thru the traditions of equity. It would not only be judicial legislation, but would nullify a statute which is conceded to be constitutional. It is a mistake to view this statute as relating to procedure only. It creates a right in favor of the aggrieved taxpayer, and, from considerations of the highest public policy, abolishes the right to stay the collection of public revenues by injunction. The Courts may not rightfully nullify it upon the ground that the remedy

> which it gives is less adequate than the one which it takes away. The statute being constitutional, the judgment of the legislature on that subject must control. Such statutes have been frequently before the Supreme Court, and have been uniformily held to afford a plain, speedy and adequate remedy such as excludes the right to resort to equity. *Tennessee v. Snead, 96 U. S. 69; Shelton v. Platt, 139 U. S. 597; Allen v. Pullman Co., 139 U. S. 658; Indiana Manufacturing Co. v. Koehne, 188 U. S. 681; Singer Sewing Mach. Co. v. Benedict, 229 U. S. 481.*"

Here it is said that the statute is not attacked because unconstitutional, nor could an attack if made be sustained and that therefore the legislation is valid.

This is clearly correct, for had there been any real or imaginary ground upon which the statute could have been challenged it cannot be conceived, in view of the long and rambling brief attacking the Court's decision, that the matter would have been overlooked in the effort to break down the decision.

The Court here says that this statute was not intended to be cumulative and that its object was to give an action at law for the recovery of invalid taxes, in lieu of a suit in equity to restrain their collection. This is manifestly correct from the unbroken line of judicial announcements of Courts of Colorado and the grave evil sought to be eradicated by the legislation adopted.

It is, of course, conceded that every taxpayer of Colorado, whether a resident and citizen of the state or not has a right to insist that the burdens of taxation shall be uniform and that he be compelled to pay no more than his rightful portion of the totality of burden, but the statute is the shield unto all in all Courts, and as it will afford relief in one suit and the payment dissipates the cloud, there is no call for equitable interference upon the mere pretense or allegation of multiplicity and cloud and consequent irreparable injury. The equity jurisdiction of the State and Federal Courts remains unsullied, though there is no occasion for its exercise for the statute affords a full relief, except in cases of exceptional circumstance as declared by the Colorado and Federal Courts including the opinion at bar, of which this cause presents none.

Section 5750 Should Not Be Judicially Annulled.

7. The Court of Appeals then pertinently inquires whether it lies with the Courts to say that this remedy which the legislature of the sovereign state has adopted is inadequate and the evil which it has condemned shall, therefore, be continued.

It is further declared that such a course urged by petitioner would be to nullify the law through the traditions of equity and the Court might well have added "to render the sovereign power subversive to this pretense of equity." The Court says such a course would

not only be judicial legislation but would nullify a constitutional statute, and further that it is a mistake to view this statute as relating only to procedure, for it creates a right, a substantial right, in favor of the aggrieved taxpayer and from considerations of the highest public policy abolishes the opportunity to stay the collection of public revenue by injunction.

This idea is not novel, nor by the Court created, as is manifest from the declarations of the Colorado Court above quoted, as well as the decisions of the Courts of the United States. It is also declared by this tribunal, that Courts may not rightfully nullify a statute upon the theory that the remedy given by it is less adequate than the one it takes away. This is immaterial so long as there is left to the taxpayer a remedy such as that created by 5750 universally declared to afford a plain, speedy and adequate remedy at law.

The Court further says that the statute being constitutional, the judgment of the legislature and not of the Courts must control, and further that statutes of like import have breen frequently before the Supreme Court and uniformly held to afford a plain, speedy and adequate remedy such as excluded the right to resort to equity, and then cites in support of the declaration the authority upon which the declaration is premised.

This last declaration of course is not a statement by the Court, as sought to be contorted by counsel, to effect that under no set or combination of circumstances could equity interfere; nor into a declaration

tantamount to the surrender of the equity jurisdiction of the Courts of the United States.

The question of the equity jurisdiction of this Court is not involved. *The only question is when and under what set of circumstances may that jurisdiction be appealed to for righting some wrong, for which the law affords no adequate relief.*

The Court in its opinion, neither in this declaration nor in the statement that the Trial Court followed the decision in Singer Sewing Machine Co. v. Benedict, *supra,* held that the legal remedy under the statute of Colorado excludes equity in every case, either in State or Federal Courts, for later in the opinion it is said that in rare cases it may happen that the fraud of taxing officers will create a condition which statutes like 5750 will not enable Courts to redress.

All that is declared and held by this language of the Court is that in this case the law gave adequate relief and that, statutes of the character of 5750 have been frequently held to afford a plain, speedy and adequate remedy excluding resort to equity, as held in the cases cited in support of the declaration.

The cases cited in this portion of the opinion clearly manifest the correctness of the principle announced.

In Tennessee v. Sneed, *supra,* it appears there existed in Tennessee a statute providing that where any taxpayer believed the tax to be unjust or illegal or against any statute or clause of the constitution of the

state, he could pay under protest and within thirty days thereafter sue for recovery. (pp. 71-2.)

Another section of this act made this remedy exclusive.

In speaking on the subject of adequate legal remedy, the Court at pages 74-5 says:

> "We think the regulation of the statute gave him an abundant means of enforcing such right as he possessed. It provided that he might pay his claim to the collector under protest, giving notice thereof to the comptroller of the treasury; that at any time within thirty days thereafter he might sue the officer making the collection; that the case should be tried by any Court having jurisdiction, and, if found in favor of the plaintiff on the merits, the Court should certify that the same was wrongfully paid and ought to be refunded, and the comptroller should thereupon issue his warrant therefor, which should be paid in preference to other claims on the treasury.
>
> "This remedy is simple and effective. A suit at law to recover money unlawfully exacted is as speedy, as easily tried, and less complicated than a proceeding by mandamus. Every attorney knows how to carry on the former, while many would be embarrassed by the forms of the latter. Provision is also

made for prompt payment of the amount by the state, if judgment is rendered against the officer on the merits.

* * * * * * * * * * *

"In revenue cases, whether arising upon its internal revenue laws or those providing for the collection of duties upon foreign imports, it (United States) adopts the rule prescribed by the State of Tennessee. It requires the contestant to pay the amount as fixed by the government, and gives him power to sue the collector, and in such suit to test the legality of the tax. There is nothing illegal or even harsh in this. It is a wise and reasonable precautiuon for the security of the government. No government could exist that permitted the collection of its revenues to be delayed by every litigious man or every embarrassed man, to whom delay was more important than the payment of costs."

From this case it is clear that under the laws of Tennessee there was a right to recover the asserted illegal tax in one action at law and the Court holds the remedy is simple and effective and that it is as speedy and as easily tried, and less complicated than a proceeding by mandamus.

The Tennessee statute, like the law of Colorado, provided for a recovery in one suit by the aggrieved taxpayer.

The Court then declares that the rule of the United States excluding equitable interference with tax collections and requiring payment and suit for recovery is similar to the law of Tennessee.

The Court also holds that there is nothing illegal or even harsh in this practice, and approves the method as a wise and reasonable precaution for the security of the government.

Clearly this case is one presenting for consideration identically the points here at issue and equally clear is it pertinent to and supporting of the language of the opinion of the Circuit Court of Appeals.

The case of Shelton v. Platt, *supra*, also arose from the State of Tennessee, and concerns the same sections of the Tennessee law requiring aggrieved taxpayers to pay under protest and to sue to recover back any part found to be illegal. From pages 596-7-8 of the opinion we quote the following language pertinent to this issue as an authority clearly supporting this opinion.

> "There is no allegation of inability on the part of the express company to pay the amount of the taxes claimed, nor any averments showing that the seizure and sale of the particular property which might be levied on, would subject it to loss, damage and inconvenience which would be in their nature irremediable. The bill showed the company to be doing a vast business, and it was an un-

reasonable inference that it must submit to the sale of its wagons and horses or that such sale would work that kind of mischief which justifies the intereference of equity in the application of a preventive remedy. Nor did the mere fact that its property might be used in the conduct of interstate commerce give jurisdiction. But in addition to all this, since 1873 there has been a statute in existence in Tennessee, providing a remedy at law, which has been pronounced by this Court simple and effective. Tennessee v. Sneed, 96 U. S. 69. Under that act, where an officer charged by the law with the collection of revenue due the state takes any steps for the collection of the same, a party conceiving the tax to be unjust or illegal may pay it under protest, and sue the officer to recover the money back, and if the Court determines that it was wrongfully collected, then, upon its certificate to that effect, the comptroller 'shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury.' And the act further provides that there shall be no other remedy in any case of the collection of revenue, and no writ for the prevention of such collection or to hinder and delay it shall in any wise issue, either injunction, supersedeas, prohibition or other writ or process whatever.

"This act has been sanctioned and applied

by the Courts of Tennessee. Nashville v. Smith, 86 Tennessee, 213; Railroad v. State, 8 Heiskell, 663, 804. It is, as counsel observe, similar to the Act of Congress forbidding suit for the purpose of restraining the assessment or collection of taxes under the internal revenue laws, in respect to which this Court held that the remedy by suit to recover back the tax after payment, provided for by the statute, was exclusive. Snyder v. Marks, 109 U. S. 189; 13 Stat. 152, 475. Legislation of this character has been called for by the embarrassments resulting from the improvident employment of the writ of injunction in arresting the collection of the public revenue; and, even in its absence, the strong arm of the Court of Chancery ought not to be interposed in that direction except where resort to that Court is grounded upon the settled principles which govern its jurisdiction.

"It is asserted by counsel that a Court of equity has jurisdiction to restrain the collection of a tax when the tax is wholly illegal and void, and that such jurisdiction has been uniformly exercised in the Federal Courts. Allen v. Balt. & Ohio Railroad, 114 U. S. 311; Osborn v. Bank of the United States, 9 Wheat. 738; Cummings v. National Bank, 101 U. S. 153; and Dodge v. Woolsey, 18 How. 331, are cited; but the jurisdiction will be found to

have rested on other grounds than merely the unconstitutionality of the taxes involved."

The case of Indiana Manufacturing Co. v. Koehne, *supra*, arose from the District of Indiana.

In Indiana there existed a statute as shown at page 682 of the report cited, providing that any person or corporation may appear before the board of commissioners of any county and show by proper proof that such person or corporation has paid taxes which were wrongfully assessed against him or it, and it is thereby made the duty of the board to order the amount so proved to have been paid, to be refunded to the payer from the County Treasury so far as the same was illegal, and paid for the county, and also a provision for repayment of that part, if any, which has been paid into the treasury of the state.

This was an action to enjoin the collection of a tax. The statute afforded a legal remedy and therefore no resort to equity could be allowed. The case presents practically all the points here, for it arises from a state having a statutory policy of noninterference by injunction with tax collection like the law of Colorado.

The equity heads presented were: cloud on title, no adequate remedy at law, and multiplicity of suits.

The case presents so many of the points here at issue, which are decided as here decided, that for elucidation of the subjects we wish to make plain we now call attention to several portions of the opinion.

From the language of the opinion at page 685 of the report it is apparent that the multiplicity ground was based upon the same premiss as that in the case at bar, though there it is said, the bill of the plaintiff averred that Koehne, the County Treasurer, had a duty to collect taxes for the State, Marion County, and the School Board, and the City of Indianapolis, and that no suit could be brought against the city for recovery of any taxes collected for it; and that when the treasurer paid the moneys collected to the different bodies to which they belonged, they would be beyond the reach and control of the treasurer.

Following this language is the answer of the Court to the plaintiff's claim that the State could not be sued:

> "The averment that a portion of the tax is to be paid to the State of Indiana and that the state cannot be sued is answered by the remedy provided by the law of Indiana for such a case."

Further referring to the procedure at law under the Indiana statute the Court at page 685, *et. seq.*, says:

> "Under that law the complainant was bound in the first place to appeal from the decision of the Board of Review, which included the letters patent in the value of the shares of stock of the corporation. Such appeal would, by the provisions of the statute, be taken to the State Board of Tax Commis-

sioners, and if that board affirmed the decision of the Board of Review the corporation could pay the tax and immediately file a petition with the Board of County Commissioners to recover it back under the Act of 1853, above referred to. An appeal is given from the refusal of that board to repay the tax. 3 Rev. St. Indiana, Sec. 7917, ed. of 1894; Shultz v. Board etc., 20 Indiana, 178; State v. Board etc., 63 Indiana, 497, 501. This appeal would be taken to the Circuit Court, and by the general law an appeal lies from that Court to either the Appellate Court or the Supreme Court of the State, according to the amount involved.

"The fact that a portion of the money raised by the tax might be for state purposes is not material under the provisions of the Act of 1853, *supra*. The Courts of Indiana have held that the filing of a petition with the Board of Commissioners under that Act was in itself notice to the county, and if thereafter the money was paid over to the state or to the city, it was no defense; that when the board of commissioners received notice, the county became a trustee for the claimant, and in the event the money was awarded to him the county was bound to refund the same, and a payment by the county authorities after such notice, or the commencement of an action, to the state or town authorities was at

its own risk and peril. The taxpayer could not be required to pursue such funds into the hands of the parties to whom they were wrongfully distributed, and the fact that the taxes were voluntarily paid constituted no defense under the statute cited. DuBois v. Board, etc., 10 Ind. App. 347. It is also said in the above case that if the money had been paid over when the petition was filed, the statute provided that the commissioners should give the claimant a certificate to the state auditor for the repayment by the state treasurer, when taxes had been paid that were wrongfully assessed for state purposes. There was nothing, therefore, to prevent the complainant herein from paying the tax and immediately filing its petition with the board of county commissioners to have it refunded and the payment to the state (if made) was immaterial and constituted no defense. The tax could be recovered back notwithstanding the payment to the state.

"It has been argued, however, that the Act of 1853 was not broad enough, inasmuch as it required that the taxes should have been wrongfully assessed and that mere illegality would not be sufficient in order to recover under the statute, citing Commissioners, etc., v. Armstrong, 91 Ind. 528. That case simply held that where property was legally taxable

and the tax assessed was justly and equitably due, if thru some irregularity it had not been legally assessed, it could not be said to have been 'wrongfully' assessed within the meaning of the statute of 1853 and recoverable back under that statute; but that very case shows that if property which was not taxable was assessed and the money paid, such assessment was 'wrongful' within the statute of 1853, being made upon property liable to taxation, and therefore it could not be said that any tax so assessed was justly or equitably due."

Again, on page 687 of the report, the Court in conclusion says as to the remedy:

"There is no doubt, therefore, of the adequacy of the remedy at law, provided the Act of 1853 is in force."

And speaking of the question of multiplicity on page 689 of the report appears the following language:

"The remedy provided by the State of Indiana is in truth but one proceeding, and all the complainant had to do in order to avail itself of such remedy was to appear before the board of review when the assessment was first made and object to it, and if its objections were overruled, then to appeal to the state board, and if the board also overruled

> the objection, then to pay the tax. The preceeding thereafter is one suit commenced by application to the board of county commissioners to recover the tax wrongfully assessed, and if the claim were refused, then the party might go into the Circuit Court, and if refused again, it had the further right of appeal, and if still refused, it then had the right of review by writ of error from this Court, if any federal question had been decided against it. The right to come into the Federal Court and invoke its equitable jurisdiction in order to avoid the remedy thus provided by the state cannot, under these facts, be founded upon the alleged prevention of a multiplicity of suits. The claim on such ground is without foundation.

In Allen v. Pullman's Palace Car Co., *supra*, the Supreme Court of the United States had again under consideration an attempt to evade the laws of Tennessee and to restrain the collection of a Tennessee tax on the ground of irreparable injury and multiplicity of suits.

The Court citing Shelton v. Platt and the Tennessee statute adheres to the same doctrine theretofore announced.

The only distinguishing feature of this case is that the point of adequate remedy at law was first raised in the appellate tribunal.

In Singer Sewing Machine Co. v. Benedict, *supra*, the litigation concerned the same statute of Colorado as here involved; the Court adhered to its former holdings and by its clear and emphatic ruling set at rest so many of the questions which are here involved in conformity with, and upon which the opinion of Circuit Court of Appeals in this case is rightly premised, that for the purpose of making more plain some of the points which we believe are there clearly established, we quote fully from the opinion:

At page 484 appears:

> "In the Courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares, Rev. Stats. 723, and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the Court to interpose the objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendant *in limine*. Reynes v. Dumont, 130 U. S. 354, 395; Allen v. Pullman's Palace Car Co., 139 U. S. 658. There was no waiver here. The objection was made by the demurrer and again by the answer, and so, if it was well grounded, it was as available to the defendants in the Circuit Court of Appeals to prevent a decree against them

there as it was in the Circuit Court. Boise Artesian Water Co. v. Boise City, 213 U. S. 276."

From this language of Mr. Justice Van Devanter it is clear that a bill in equity does not lie in any case concerning taxes due to the Government of the United States where there is a plain, adequate and complete remedy at law. This is declared by Section 723 of the Rev. Stat. and the decisions of the Court upholding the provision are without number.

This makes it clear that it is the rule in the Courts of the United States that no matter what be the pretense of resort to equity, whether fraud, multiplicity, cloud, or otherwise, the jurisdiction does not exist and the complaint will not be entertained, if there is a plain, adequate and complete remedy at law.

We suggest that in this opinion it is held that whether this policy of administration in such matters is to be adopted in any state is a matter of its choice, within its sovereign power in the adoption of its machinery for assessment, collection and equalization of its revenues.

We have seen that where statutes have been adopted establishing a policy similar to that of the United States the Federal Courts have given their sanction and upheld the laws and policy adopted in such states. That this is true is manifest from consideration of the opinions of the Supreme Court con-

cerning the law in this regard adopted by the States of Tennessee and Indiana in the cases above cited.

In the case at bar again comes the same question and the Court in its opinion declares that Colorado, like the Federal Government, has adopted the rule of denying the right of equitable interposition,—which is binding and effective in all instances where there is a plain, speedy and adequate remedy at law.

It therefore follows that the same rule applies as that announced by Mr. Justice Van Devanter in the quotation above, to-wit:

> "A bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law."

Therefore, there is left alone for determination, the question of whether in any case arising in Colorado where equity is invoked to stay by injunction the collection of its taxes—

Is there a plain, adequate and speedy remedy at law?

If it be found that there is such remedy, under the circumstances set forth in the bill, equity will not take jurisdiction.

That there is such legal remedy here is declared by the Supreme Court in the Singer case as shown thruout the opinion and particularly by the language appearing at pages 485-6, as follows:

"A statute of Colorado enacted in 1870 (Laws 1870, p. 123) and embodied in subsequent revenue acts (2 Mills' Ann. Stat., Laws 1902, c. 3, pp. 43, 146; Rev. Stat. 1908) declares that 'in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer.' This imposes upon the county commissioners the duty of refunding, without abatement or discount, taxes which have been paid and are found to be illegal, and confers upon the taxpayer a correlative right to enforce that duty by an action at law. As long ago as 1879 the Supreme Court of the State, in holding that the invalidity of a tax afforded no ground for enjoining its enforcement, said of this statute: 'against an illegal tax, complainant has a full and adequate remedy at law, and we see no reason why in this case he should not be remitted to that remedy.' Price v. Kramer, 4 Colorado, 546, 555. And again 'The statute furnishes another remedy in such cases which is complete and adequate.' Woodward v. Ellsworth, 4 Colo. 580. And that this view of the statute still prevails

> is shown in Hallett v. Arapahoe County, 40 Colorado, 308, 318, decided in 1907, where, in refusing equitable relief against the collection of taxes alleged to be illegal, the Court said by Sec. 377, 2 Mills' Anno. Stat., it is provided that taxes paid which shall thereafter be found to be erroneous or illegal, shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded the plaintiff by this section is not adequate."

We maintain that from this declaration of the Supreme Court it is manifest that there exists according to the opinion of the Supreme Court of the United States and the Supreme Court of Colorado, a law of Colorado which will give in one suit adequate relief.

It is not contended that the statute of Colorado, or the decisions of its Courts upholding the enactment and adhering to the policy of non-interference by equity with her taxing power, does or can define, limit or effect the jurisdiction in equity of the Courts of the United States, for this they could not do, as is apparent from the following declaration of Mr. Justice Van Devanter at page 486 of the report:

> "We refer to these cases, not as defining the jurisdiction in equity of the Circuit Court, for that they could not do. (Payne v. Hook, 7 Wall. 425, 430; Whitehead v. Shattuck,

138 U. S. 146; Smythe v. Ames, 169 U. S. 466, 516), but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the Circuit Court, no less than in the state Courts, if the elements of federal jurisdiction, such as diverse citizenship and the requisite amount in controversy, were present. Ex parte McNeil, 13 Wall. 236; United States Mining Co. v. Lawson, 134 Fed. Rep. 769, 771. Thus it will be perceived that, if the taxes in question were illegal and void, as asserted the company had a remedy at law. It could pay them and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this Court often has held, is plain, adequate and complete in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. Dows v. Chicago, 11 Wall. 103, 112; State Railroad Tax Cases, 92 U. S. 575, 613-614; Shelton v. Platt, 139 U. S. 591, 597; Allen v. Pullman's Palace Car Co., Id. 658, 661; Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 686."

From this language it is apparent that neither the statute of Colorado nor the decisions of her Courts declaring its validity, effect or limit the equity jurisdiction of the Courts of the United States.

The equity jurisdiction of no Court is touched or impaired. The sovereign State of Colorado denies to no citizen the equal protection of the law, and deprives none of their property without due process. Colorado has adopted for the maintenance of its government and the perpetuity of its institutions a system of revenue assessment, collection and equalization such as in its legislative wisdom seemed best adapted to answer governmental necessity and to accord justice to all payers of the tax including a plain, speedy and adequate remedy for the protection of the aggrieved to recover any invalid or illegal burden in any way exacted. The Courts of equity of Colorado, or the United States though their jurisdiction remains unsullied will not destroy or pervert these policies, under simple pretense of equity, or in any case unless the necessity for equitable interposition is clearly shown to exist.

To hold contrary to this assumption would be to say that any taxpayer owing to the support of the State of Colorado a tax in excess of $3,000, irrespective of the laws and methods established concerning the revenue, could have resort, under the guise of equity, to the Courts of the United States, and stand upon a different plane before the law than other payers of Colorado tax, who lack alone the residential qualifications to confer jurisdiction upon the Federal Court. Such a condition, obviously obnoxious to the fundamental principles of our government, does not and cannot be permitted without destruction of equity before the law.

It is, therefore, clear that the Court is not and cannot be concerned with the cause or reason of the invalidity of the tax. The tax must be paid. If it be invalid it may be recovered, as we shall hereafter show, and as the Court has already decided, in one suit at law. If under the peculiar circumstances, of the case equity is necessary to afford relief equity will intervene, but in all cases, irrespective of the cause of the invalidity, equity will not intervene if the remedy at law is plain, speedy and adequate, so as to afford relief.

The only ground upon which equity can intervene is, that there is no plain, speedy and adequate remedy at law.

The allegations of cloud on title, multiplicity of suits and the like are allegations in all cases in aid of the necessary fact of irreparable injury by pursuit of the right through the agencies by law established.

Here the tax payment answers the contention of cloud, and one suit denies the multiplicity.

In the case at bar the statute affords full relief. This is apparent, not only from the allegations of the bill and the finding of the Court concerning the voluminous evidence introduced, but from the statute so long in vogue and consistently adhered to, protecting every right of the taxpayer, in cases such as this, in one suit at law.

Many reasons have been proffered, but not established, as we shall hereafter show, that if there be any

reason for a refund or repayment, the Colorado statute will not give full relief.

If, in the case at bar, at the beginning of this trial the plaintiff had a plain, speedy and adequate remedy at law, as we maintain it did, the decision of the Circuit Court of Appeals is correct and the plaintiff must be remitted thereto.

Raymond v. Traction Company Distinguished.

8. The opinion of the Court of Appeals proceeds to say that counsel for the plaintiff insist that Raymond v. Traction Company, 207 U. S. 20, is an exception to the rule of the cases last analyzed, but that the Court does no so regard the decision, saying:

> "The opinion is expressly based on the ground that there was no statute in Illinois authorizing a single action for the recovery of money paid in discharge of an illegal tax; that the only remedy was the common law remedy to pay under protest, to enforce which a multiplicity of actions was necessary." (p 39-40.)

The Court's interpretation of that decision is clearly correct, under the law of Illinois, concerning which the decision was made, there was no statute affording a plain, speedy and adequate remedy in one suit at law, and it may be readily understood why the decision of the Courts of the United States did differ

from the rule announced where the contrary condition was true.

At pages 38, 39 and 40 of the opinion cited by the Court, it said:

> "Undoubtedly if there be a complete and adequate remedy at law in such a case as this, the remedy in equity will not be recognized."

Then the Court proceeds to explain why the rule of decision was different in Tennessee cases because of the statute of Tennessee, and then to say that:

> "There is no statute of a similar kind in Illinois which has been called to our attention, but some of the cases in that state hold that such a suit may be maintained against the collector when the money was paid under protest."

Then the Court in the Illinois case proceeds to explain that, after the money was paid it would be disbursed to the City Treasurer, County Treasurer, Treasurer of the Sanitary District, and other authorities, and to recover it back would require a multiplicity of suits, and that the portion going to the State of Illinois could not be recovered back by any legal proceeding whatsoever, and therefore these conditions would work to the taxpayer a great and irreparable injury, for which there was no complete and adequate remedy at law.

This decision, we submit, is in strict conformity

with all the decisions of the Courts of the United States, and the equity jurisdiction was there maintained solely because the conditions there were different from the conditions here, in that in Illinois there was no statute permitting recovery in a single suit, and the allegations of the bill of a multiplicity was founded upon fact and not upon created conditions conjured only by the hand that drew the bill.

Had the conditions of statutory right in Illinois been as they are here, and were in the case of the Singer Sewing Mach. Co. v. Benedict, the decision would have been, for the same good reason, just like the decision of Mr. Justice Van Devanter, in the Singer case, and that of the Circuit Court of Appeals in the case at bar. There was every reason for the Illinois decision, as well as reason for the determination here.

Cloud on Title.

9. The Circuit Court in its opinion further says:

> "Counsel urges as an 'equitable circumstances' that the tax will cast a cloud upon the title to the company's real property. The remedy which the statute prescribed, however, will dissipate any such cloud. Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief, are not applicable when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the

Courts hold to have been illegally exacted."

This so-called "equitable circumstance" of cloud on title is not well founded in fact, for as is said by the Court:

> "There will be no cloud if the plaintiff pursues its remedy at law."

It will pay its tax. No property will be sold and any portion of this tax thereafter found to be illegal will be repaid without abatement or discount to the taxpayer.

If this repayment be not made by the board to whom the application must be made under the law, no cloud can be cast upon title, for, during the time of the application, or suit to recover, if suit be necessary, no tax will be due upon which a deed could be obtained or from which a cloud could arise. The title to the property abiding the result of the trial would remain unclouded and any moneys due to the taxpayer would be returned.

The cloud cannot attach whenthe tax is paid, nor unless a tax-sale be had and certificate of purchase issue; nor then until after it be held the statutory time and a deed is issued; nor then until the deed shall be placed of record, when for the first time the cloud will appear.

This is manifest from the Colorado case of Morris v. Bank, 17 Colo. 231, where it was held that a title

was not clouded until the tax deed was recorded. The Court at page 241 says:

> "When did the tax deed become a cloud upon plaintiff's title? As we have seen, no title is conveyed by the tax deed until it is recorded. Until it is recorded, the deed is not *prima facie* evidence of title, nor of a duly advertised tax sale, nor of any other prerequisite to a valid conveyance under the revenue act. When defendants acquired a *prima facie* title to the land by putting the deed upon record, the plaintiff's title was clouded; then for the first time plaintiff's present cause of action accrued, and it might thereupon bring its action to determine the validity of such deed."

And again, in the case of Wason v. Major, 10 Colo. App. at page 185, the Court follows the doctrine laid down in the Morris case.

And again, in the case of People v. District Court, 29 Colo., 182, one of the leading cases of this state on remedies by injunction, the Court, by Judge Steele, says:

> "No cloud is cast upon property of these plaintiffs either by the assessment or by the levy, for this Court has held that a cloud is not cast upon the title to one's property until after a tax deed is issued and recorded."

This allegation of the bill of cloud on title, there-

fore, has no foundation in fact. No proof was offered and none could be adduced to sustain it.

The railroad was able to pay its tax and payment prevents the embarrassment and sets at rest the borrowed trouble of the plaintiff here. "Sufficient unto the day is the evil thereof." And the evil day could never come.

The title cloud is mere mist of imagination.

Fraud in Assessment.

10. In the next paragraph of the opinion the Court says:

> "Counsel also urges that the taxing officers were guilty of fraud in the assessment of plaintiff's property, and that fraud is a ground of equitable jurisdiction. But it is by no means true that wherever fraud exists equity may be resorted to for redress? That is not the case when a legal remedy has been substittued by statute for the remedy in equity. We are not concerned with the cause of the invalidity of the tax. It may be due to illegality, unconstitutionality or fraud. Whatever the cause it can do no more than make the tax invalid, and that alone is not a ground of equitable jurisdiction."

This statement of the Court is clearly correct. Of

what materiality can be the cause of the invalidity of the tax? If the tax is invalid from any cause whatever, it must be refunded without abatement or discount to the taxpayer. The cause of the invalidity in no manner effects the right. If the tax is invalid it may be recovered. There is nothing in the law that in any way effects the right of recovery because of the reason of the invalidity of the exaction. The law deals alone with the fact and correlative right. It follows that this law gives relief and is intended to cover and does cover, as it states expressly, every payment of taxes invalid from any cause.

Exceptional Cases.

11. The Court of Appeals next says:

> "In rare cases it may happen that the fraud of taxing officers will create a condition which statutes like Section 5750 will not enable the Courts to redress. *Cummings v. National Bank, 101, U. S. 153,* is mentioned in Bent County v. Santa Fe R. R. Co., *53 Colo. 609,* 125 Pac. 528, as an example of this kind, though in the State of Ohio, where that case arose, there was an express statute authoriza a resort to equity; and the Supreme Court of the United States has since held that *Cummings v. National Bank* rests upon that statute. *Shelton v. Platt, 139 U. S.,* 591, 599."

It is thrue that rare cases may arise, though as

said by this Court this is not one, where under statutes like 5750 the law will not afford an adequate relief. While this is true the statute gives a relief by proceedings at law. If the relief by law accorded is in the instance adequate the extraordinary course of resort to equity is not necessary and will not be allowed.

It is true that Cummings v. Bank, *supra*, has been cited as a case wherein a resort to equity was necessary. In that case the revenue methods of Ohio contained, as a part of the taxing machinery, a provision that an aggrieved taxpayer might resort to equity, and also in the facts of that particular case, whether the decision did rest upon this statute of Ohio alone, as it is said in the case cited by the Court, the bank under the Ohio law was a sort of stakeholder or trustee, and was required to pay the tax upon the shares of the holders of its stock or to withhold dividends until the tax had been paid.

There existed in Ohio a taxing system under which there were four sets of assessing and equalizing boards, for as many classes of property, and there had been long indulged a practice whereby these different classes were assessed for taxation at different percentages of value respectively to the class. It was therefore claimed that no matter how well the tax burden might be equalized between payers of different classes that it would be almost, if not quite impossible, to get an equalization of all the property, even though they did not indulge in different rates of valuation.

It was held by the Ohio Court, mentioning the statute permitting equity, that if the bank paid a tax which was thereafter found illegel, and by its shareholders successfully so asserted, the bank being in the position of a stakeholder, could not recover back from the shareholder or counter-claim against suits by the shareholders for recovery of their dividend. This question of multiplicity of suits was one of the reasons strongly urged why under the situation there prevailing, and under the statutes of Ohio surrounding, that equity jurisdiction should entertain the cause.

No Exceptional Features in Case at Bar.

12. The Court of Appeals then says:

> "In our judgment the present case contains no exceptional features of the kind to which we have adverted."

This declaration of the Court is clearly correct, for there are and can be found, neither in the allegations or in the evidence introduced at the hearing, any feature, or any fact from which it may be said that the plain, speedy and adequate remedy of the Colorado statute does not afford a sufficient relief.

This language is not a holding that no case could arise presenting features of equitable cognizance sufficient for the invoking of equitable jurisdiction under the Colorado law nor is it a declaration that under no possible set or combination of circumstances could a

Court of the United States entertain equity jurisdiction. It is simply a finding based upon the facts of this case that there is no reason shown by the bill or evidence calling for equitable interposition and that, therefore, the plaintiff must be remitted to law, which affords it full and speedy relief.

It is a clear recognition of the principle universally upheld by the Courts of Colorado and by this Court that the equity jurisdiction of no Court is afected, but that in no case can this ancient jurisdiction be invoked and its extraordinary powers be employed to interfere with the highest function of government, except where the remedies of the law are clearly shown to be inadequate to accord relief.

Multipliicty of Suits.

13. The Court of Appeals then disposes of the contention of plaintiff concerning multiplicity of suits in the following language:

> "Again we are told that the remedy given by the statute will lead to a multiplicity of suits. The county treasurer is, under the statutes of Colorado, the collector of all taxes, state, county, school and municipal. In the accounting system which the law provides, he is required to pay over the taxes to the state, city, school and town authorities as the same are collected. It is, therefore, urged that if the plaintiff should pay the

taxes here complained of, they would be promptly distributed to the several public treasuries on whose behalf they were levied, and that plaintiff would be compelled to resort to a separate suit against each of these in order to recover the money paid. These difficulties are all of counsel's own creating. They do not exist in the statute. Its language is plain and comprehensive. It provides that 'in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall be found to be erroneous or illegal * * * the board of county commissioners shall refund the same, without abatement or discount, to the taxpayer.' As to state taxes there is an express provision giving to the county credit in its accounting with the state for any taxes that have been refunded. We have no doubt that the same remedy would apply as to municipalities and that the county treasurer could take credit in his settlement made from time to time with them for their proportion of any sum which the county was compelled to pay as a refund. Be this as it may, the language of the statute is plain. It has existed for more than forty years. It has been repeatedly held by the highest Court of the state to afford the taxpayer a plain, speedy and adequate remedy.

"We cannot, from speculative reasoning as to difficulties of accounting, hold that the

> aggrieved taxpayer will not receive, in a single suit against the county, the full compensation which the law provides. All the dangers as to multiplicity of suits were present in the case of *Singer Sewing Machine Company v. Benedict*, 229 U. S. 681, and still the remedy provided by the statute was held to be plain, adequate and complete so as to exclude a resort to equity."

This language of the Court is pertinent and correct.

The difficulties concerning multiplicity of suits are created by counsel and will, and do not exist in actuality.

The statute is answer to the plaintiff's contention. It provides, as stated in the opinion, that in all cases where any person pays *any* tax, or *any* portion thereof, that shall thereafter be found to be erroneous or illegal, the board of county commissioners shall refund the *same* without abatement or discount.

This means what it says; that the commissioners of the county, who are in a way the tax collecting agency for all branches of the government, shall repay, out of the funds collected by it, all the tax that is found to be illegal.

Though there is no provision pertaining to municipality, it is clearly reasonable to conclude that the same rule would apply as to the division of this repayment as pertains under the statute concerning the state.

If the law should be held to be as plaintiff contends, an aggrieved taxpayer could have repaid to him under the statute, the county and state taxes, and as to those of municipalities he must resort to injunction for relief. This would practically emasculate the statute and instead of clarifying would incumber the remedy of the aggrieved taxpayer, and embarrass the state as well. Clearly this is not the intent or purpose of the law. The presumption is that upon application for rebate before the board of county commissioners, before there is any disbursement or distribution by the treasurer whatever, the rebate or refund to which plaintiff is entitled would be paid him, but if this were not the case, clearly under the statute, as has been repeatedly held, the aggrieved taxpayer in one suit may recover in an action at law, whatever may be the system of accounting of the county, with which that taxpayer is not concerned, all of the tax legally exacted.

That this recovery may be had in one suit has been judicially determined in the case of Singer Sewing Machine Co. v. Benedict, 229 U. S. 486.

This allegation of a multiplicity of suits is without foundation for if it existed in one case it would exist in all (except under some circumstances like in Cummings v. the Bank). Every county has school districts and other municipal branches and every county collects for the state as well as for all these and other municipal bodies.

In the County of Denver wherein the Singer

Sewing Machine decision applied, there are, like in Weld and Bent and other counties, city and school districts. The number of school districts, towns and cities vary in the different counties, but the fact that they are more numerous in some than in others in no manner changes the principle.

In the case of Indiana Manufacturing Co. v. Koehne, *supra*, this question of multiplicity of suits was raised in the same manner as here urged. In Indiana there was a statute for repayment of the illegal tax and it was there held that the plaintiff must be remitted to its action at law.

In the Indiana case the Supreme Court of the United States declares that there is a statute in Indiana under which the aggrieved taxpayer claiming payment of an illegal tax, if the tax be not returned to him by the taxing boards, may sue for the recovery. In this regard the situation there is as was the situation here.

It further appears from the Indiana case that the defendant Koehne was County Treasurer of the County of Marion, and ex-officio custodian of funds collected as taxes for the State of Indiana, the City of Indianapolis and the school district.

In this regard the situation as to the collection of tax by the county treasurer in Indiana was identical with that of the county treasurer in Weld County, Colorado. Every circumstance concerning this pretense of a multiplicity of suits pertained to the situa-

tion in Indiana as pertains here. The claim would have merit in a situation like that in Indiana and one like that in Colorado, were it not for the fact of the Indiana statute in that instance and the Colorado statute in this. The statute allowing the recovery in one action, as is said in the Indiana case, and as has been held in the Colorado cases, is the answer to this pretended and self-created ground for exercise of equity jurisdiction tendered by petitioner.

The argument made by counsel is not only elaborate but persuasive until it reaches the statute, which sets it all aside. Without the statute it is genuine; with the statute it is pretext. The situation in Colorado, and her statutory machinery upon the subject in hand, being idenical with that of Indiana under the Koehne case, we maintain that this case is an authority setting at rest this question, adversely to petitioner's contention.

Equity Jurisdiction Determined from Conditions at Beginning.

14. The Court of Appeals then proceeds as follows:

> "Finally it is urged that the evidence has been taken and shows the taxes to be illegal and plaintiff is, therefore, entitled to keep its money; that to compel it to pay the taxes and then bring an action to recover its money under the statute would not be as complete

and speedy a remedy as a decree and injunction in this suit. Hence the plaintiff is entitled to relief in equity. But if this reasoning is sound, the wrongful resort to equity becomes the very ground of equitable jurisdiction. It is true that an injunction could be issued in this case in a shorter time than would be necessary to pay the taxes and begin an action at law and prosecute it to judgment for the recovery of the money. That, however, is not the test. To determine whether the remedy at law is as speedy and adequate as that in equity, the Court must place itself at the beginning before any litigation has been started. If the position of counsel were sound, every decision of the Supreme Court reversing a decree in equity because the the remedy at law was adequate, would be wrong. Decsions of this kind are numerous, many of them occurring in suits to restrain the collection of taxes. As the Supreme Court has often said, Section 723 of the Revised Statutes 'means something.' Buzard v. Houston, 119 U. S. 347, 351. It at least emphasizes the rule which it declares. It can be given effect in no other way than by dismissing suits brought in violation of its provisions."

Clearly no challenge could be made to this conclusion of the Court. The question is not of the situa-

tion now, but what were the rights of the plaintiff at the beginning of the litigation. If plaintiff at time of beginning suit had a remedy at law it had no right to proceed in equity. No effect would ever be given to Section 723 of the Revised Statutes or the law of any state precluding equitable jurisdiction in cases where legal remedy is given, if the test is to be applied after the litigation has proceeded for years. The time of the test is the time of remedy choice.

In this case, at the beginning of this proceeding, both remedies did not exist under the facts shown in this bill. The plaintiff's right was then by proceeding at law. It endeavored to invoke the interposition of equity. There was no equity shown in the bill, for the legal remedy stood ready to answer.

There was, therefore, no reason for this Court to express any opinion touching the validity of the taxes in question, for valid or invalid the remedy was not in a Court of equity, but a Court of law, where the merits of plaintiff's cause can alone be determined.

Refusal to Consider Evidence.

15. The Court of Appeals thereupon, in view of the foregoing facts, justly said:

> "We decline, therefore, to express any opinion touching the validity of the taxes. That issue must be determined in an action under the statute.

"The decree of the Trial Court is therefore affirmed."

Clearly this holding and conclusion is correct. The Court on examination of the bill and the law of Colorado, determining that the remedy of the plaintiff was at law, had left no reason to consider of the merits of the issues for although that had been determined in favor of defendants, it is a matter to be determined in an action under the statute; and in accordance with well established appellate procedure, the tribunal determining one point decisive of the case had no reason to consider of the propriety of the judgment of the Trial Court refusing the writ upon the ground of failure of proof upon the issues joined and the evidence introduced.

CONCLUSION.

Plaintiff asserts, among the many reasons tendered against the payment of the tax in conformity with the law and the exercise of its statutory right of recovery of the alleged excessive portion thereof, that if it does pay, and thereafter recovers back, it pays itself.

This logic is far from convincing and on scrutiny, found fallacious.

If plaintiff pays its tax of approximately $77,000 payable in 1913 for the year 1912, and apply to the commissioners of the County of Weld for a rebate or a refund to which it was found to be entitled, the board

on so finding the fact would return the invalid and excessive collection under the law.

This, of course, would necessitate the county, from all its assessable property, in the following year to compensate for the deficiency, and in conformity with the constitution of the state requiring equality of burden upon equality of value, it would enhance the necessary total tax contribution to defray all governmental expenses, from all the taxable property of the county, under the constitutional measure, and this would be done, we submit, by equality of burden in strict conformity with the law and in accordance with the principles of justice.

If the county commissioners, in their judgment, should determine on an application thereto by the plaintiff that no part of the tax paid was invalid the plaintiff must bring its action at law and the result in case of a recovery would deplete the revenues of the county in the same amount, and effect conditions in the same way as though the decree in behalf of the plaintiff had been rendered in a Court of equity as in one of law.

To make clear our answer to the contentions of plaintiff that it will be put in no different condition by compliance with the statutes of the state, than any other taxpayer complying, or than if it is allowed the special privilege of avoidance of the statute and resort to equity, we give the following example:

Suppose that A and B are the only taxpayers in

the county and that they are assessed in an amount that will make them pay $12,000 each in taxes. A claims his property is assessed double the amount that it should be assessed at, and recovers a judgment against the county of $6,000 for taxes illegally paid. If it becomes necessary to make a levy to pay this judgment, A, of course, will have to pay $2,000, being his proportionate one-third of $6,000, but the county, having received $6,000 more than it was entitled to, and having presumably used it for the legitimate needs of the county, will need $6,000 less to meet its future expenses, and A, in paying his future taxes, will be benefited to the extent of one-third, or $2,000. Thus, while A has to pay $2,000 to reimburse himself, he pays $2,000 less in taxes on account of the county receiving $6,000 that it was not entitled to. If the assessment had been properly made in the first place, and A's property had been assessed at one-third instead of one-half of the total value of the county, then, in order to collect $24,000 in taxes, the levy would have been higher, and A would have had to pay $8,000, making the final result the same.

The opinion of the Court of Appeals on application for a rehearing adheres to its original position and in no manner deviates from its original decision or the long line of decisions of the Courts of Colorado, of the Courts of Appeal, or this Court upon like premise of fact and law.

The Court of Appeals in its opinion on rehearing, in terms most clear shows the inapplicability of some

of the authorities relied on by petitioner in support of the contention that the Trial Court and the Court of Appeals had set aside the equity jurisdiction of the Courts of the United States and declared in language too plain to be misunderstood by any who are willing to understand that though the remedy by statute offered an aggrieved taxpayer in Colorado does not preclude resort to equity in every case it offers a full relief in causes under circumstances such as in the case at bar.

No addition to the reasoning of the Court of Appeals upon the cases cited in the rehearing opinion is necessary or would be of assistance here.

We respectfully contend that the opinions are clear and correct and in consonance with the long and unbroken line of judicial authority of this Court and those of the Courts of Appeal and of Colorado and to deviate from it would be destructive of that uniformity of decision which is made the pretext of resort to the extraordinary remedy of *certiorari* to preserve.

No writ of certiorari should be issued and no review of the opinion of the Court of Appeals should be allowed.

Respectfully submitted,

CHARLES F. TEW,
Solicitor for Respondents.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 108.

(24670)

UNION PACIFIC RAILROAD COMPANY,
APPELLANT AND PETITIONER,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO: W. R. PATTERSON, as County Treasurer of Said County, and S. J. McAFEE, as Sheriff of Said County,
APPELLEES AND RESPONDENTS.

Appeal from and Petition for Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR APPELLANT AND PETITIONER.

STATEMENT.

This is a suit in equity, wherein relief, both preliminary and final, is sought from certain taxes alleged to be illegal. The suit originated in the Dis-

trict Court of the United States for the District of Colorado. It is pending here upon an appeal from the determination therein of the United States Circuit Court of Appeals for the Eighth Circuit. A petition for the writ of certiorari to review said determination of the Circuit Court of Appeals is likewise here pending.

Appellant and Petitioner (hereinafter called plaintiff) filed its bill in the District Court against the Board of County Commissioners of Weld County (the corporate or collective name under which a county must be sued), its County Treasurer and its Sheriff, the appellees and respondents (hereinafter called defendants), seeking to have declared illegal and invalid and to cancel a portion of the taxes arising from the assessment of the property of plaintiff in Weld County for the year 1912, and also seeking injunctive relief, both preliminary and final, prohibiting the county and the officers thereof charged with the duty of collecting taxes from collecting or attempting to collect that portion of said taxes alleged to be invalid.

The total amount of the taxes arising from the application of the levies of the state, the county, various cities and towns and numerous school districts to the assessed valuation for 1912 of plaintiff's property in Weld County and in said respective cities, towns and school districts was $77,818.41 (see affidavit of A. W. Scribner, Printed Record, p. 42, and Exhibit A thereto, P. R., pp. 43 and 44). The respective amounts which out of this total would be collectible by and payable to the state, the county, and the several cities, towns and school districts are

set forth at the pages of the printed record last above mentioned.

Of said total amount $46,691.04 was undisputed, was duly tendered prior to bringing this suit and prompt payment thereof made, but without prejudice to the rights or contentions of either party respecting the balance (P. R., p. 32). The remaining portion of said taxes, to-wit, $31,127.37, plaintiff attacks as illegal and invalid, for the reasons set forth in the complaint (P. R., p. 11).

The taxes in dispute, amounting as aforesaid to $31,127.37, are, unless canceled, collectible by and payable to the State of Colorado, the County of Weld, and thirteen cities and towns and fifty-two school districts, substantially in the following proportions: to the State of Colorado ten seventy-sevenths, to the County of Weld thirty-one seventy-sevenths, and to said thirteen cities and towns and fifty-two school districts thirty-six seventy-sevenths. Of said thirty-six seventy-sevenths of the amount of the taxes in dispute there is collectible by and payable to each of the thirteen cities and towns and fifty-two school districts substantially an amount bearing the same ratio to $31,127.37 as the sums set opposite the respective names or designations of said cities, towns and school districts at pages 43 and 44 of the printed record bear to $77,818.41. It will thus be seen that while out of the amount of taxes in dispute the aggregate sum payable to and collectible by all of said cities, towns and school districts is relatively large, yet the sum payable to and collectible by each of said cities, towns and school districts is relatively small, and in no instance approaches the sum of three thousand dollars.

Federal jurisdiction was founded both upon diversity of citizenship (P. R., p. 2) and also upon the existence of Federal Constitutional questions (P. R., pp. 11 and 12) in that the levy, enforcement and collection of said disputed taxes did and would amount to a denial to plaintiff of the equal protection of the laws and to a taking of plaintiff's property without due process of law, contrary to the applicable provisions of the Constitution of the United States.

Equity jurisdiction was invoked upon the following grounds: (1) Systematic, continued and repeated discrimination in assessment, and the application of an illegal and unconstitutional principle of assessment, amounting to at least a constructive fraud from which equity will relieve; (2) Cloud on title, in that plaintiff's property in Weld County and in said various cities, towns and school districts involved consists largely of real estate, upon which the disputed tax is a lien, and therefore a cloud, and title to which will be further clouded by the deed pursuant to tax sale, which defendants threaten to and unless restrained will make; (3) Prevention of interference with plaintiff's duties as a common carrier, and consequent injury to the public, which will be occasioned by the seizure of its engines, cars and other movable property under writ of distraint for the collection of said disputed taxes, which seizure defendants threaten to and unless restrained will make; (4) Complicated evidence and involved issues, requiring a process analogous to an accounting and the machinery and methods of a court of equity for their proper consideration and determination; (5) Multiplicity of suits, which will necessarily result unless equity now affords relief; (6) Lack of a plain, speedy,

adequate or complete, or indeed any, remedy at law, and irreparable injury, which will be inevitable unless equity now affords relief.

As to the invalidity of that portion of the taxes claimed to be illegal, plaintiff asserted that it arose from gross discrimination in assessment or valuation for taxation purposes, whereby plaintiff's property was relatively greatly over assessed and the other property within the limits of Weld County greatly under assessed, thereby destroying the uniformity in assessment and tax burden which the Constitution and statutes of Colorado require, and imposing upon plaintiff and its property an undue burden of taxation to the extent of the amount in dispute.

In Colorado the property of railroad companies is assessed by the State Tax Commission (formerly the State Board of Equalization), and all other property in each county is assessed by the county assessor thereof. In this instance the discrimination complained of was occasioned, as alleged, through under assessment by the county assessor of Weld County, produced by his under valuation of such property as he valued at all; by his omission from assessment of large classes of property and elements of value, which were subject to taxation and which the law required him to assess; by his application to large classes of property of a wrong rule or principle of assessment, and by his allowance of exemptions to individual taxpayers in cases not permitted by the law and amounting to a very large aggregate. These and other like acts, omissions and practices, resulting in the discrimination complained of, are alleged to have been repeated, continuous, systematic and intentional, thus not only rendering the assessment itself illegal, but

likewise constituting a fraud upon the constitutional rights of the Railroad Company, or such gross mistake as would amount to fraud. (Johnson v. Wells Fargo & Co., 239 U. S., 234, 244.)

Pleadings and Proceedings in Trial Court.

The bill (P. R., pp. 2-18) alleges (p. 2) the corporate capacity of the plaintiff, the corporate capacity and official character of the respective defendants, diversity of citizenship, and jurisdictional amount. It alleges (pp. 2 and 3) that plaintiff was and is the owner of a system of railroads, extending in part through the State of Colorado as well as through other states, and that it is a common carrier of freight and passengers, both state and interstate, and that 198.23 miles of its railroad are within the County of Weld.

It alleges (p. 4) that the Constitution of the State of Colorado requires that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal; and further alleges that under said constitutional provision, and the statutes of Colorado enacted pursuant thereto, it was and is the duty of the State Tax Commission to assess plaintiff's property and that of the other railroad companies in the state at its full cash value, and that it was and is the duty of the county assessor in each county to assess all property in his county, other than that authorized to be assessed

by the State Tax Commission, also at its full cash value. It alleges (pp. 4 and 5) that, notwithstanding said statutory requirement of assessment at full cash value, it was and is the practice in Colorado, both of the State Tax Commission (and its predecessor, the State Board of Equalization) and the various county assessors, to assess said property at a fraction only of its full cash value; that in 1909, in recognition of said practice, and for the purpose of securing uniformity in taxation as required by the Constitution, an agreement was entered into between the State Board of Equalization (then the assessor of railroad property) and the various county assessors, including the assessor of Weld County, that all property in the state should be assessed at the rate of 33⅓ per cent of its actual value, which agreement remained in effect at all times up to and including the year when the assessment here complained of was made; that, pursuant to said agreement, the State Board of Equalization, and its successor, the State Tax Commission, did for each of said years, including the year 1912, assess the property subject to its jurisdiction, including the railroad property of the plaintiff, by first determining the full cash value thereof, and thereupon taking a proportion of the same amounting to 33⅓ per cent thereof for the taxable value of said property, thereupon apportioning said total assessment upon a mileage basis among the various counties through which the railroad extends, including the County of Weld; that the total assessable valuation of the plaintiff's property, thus arrived at by the State Tax Commission in the year 1912, on said one-third basis, was the sum of $7,688,130; that plaintiff's total mileage in Colorado was 583.20, its mileage in Weld County (p. 5) 198.23,

the apportionment per mile $13,183, and the total apportionment to Weld County, on a mileage basis, $2,613,250; that the assessment so made by the State Tax Commission was pursuant to and in fulfillment of said agreement with the county assessors fixing 33⅓ per cent of the actual value as the basis of assessment for all property, and that the amount so apportioned to Weld County was not less than 33⅓ per cent of the actual cash value of the plaintiff's property in Weld County at the date of said assessment, and that said assessment, so made, has been extended upon the assessment and tax rolls of Weld County, apportioned to the various school districts, cities, and towns therein, the various state, county, school district, city, and town levies applied thereto, and that warrants are now in the hands of the treasurer for collection of the same.

It alleges (pp. 6 and 7) that, notwithstanding said agreement that all property should be assessed on a basis of 33⅓ per cent of its actual value, and in violation thereof, the county assessor of Weld County, with the sanction and approval of said county, the county commissioners and other officers thereof, failed and refused to assess property in his jurisdiction at said rate, but, on the contrary, deliberately, systematically, and intentionally assessed such as he assessed at all at a rate of not to exceed 20 per cent of its actual value, and failed, omitted, and refused to assess at all large amounts of property in said county properly assessable, and required by law to be assessed by him for said year 1912, and known by him to be so situated and subject to assessment—as, for example, clocks, watches, jewelry, gold and silver plate, diamonds and other precious stones and like

property, moneys, credits, book accounts and other accounts not evidenced by writing, notes, bonds, debentures and other written evidences of indebtedness, bank deposits, capital employed in manufactures, water rights, and intangible rights and assets, owned by individuals and corporations; and that, by deducting the $200 exemption allowed by the Constitution to the head of a family from the fractional assessment made, instead of from the full value of the assessable property, the assessor, in fact, and in violation of law, actually allowed for each of said exemptions the sum of $1,000 instead of $200.

It alleges (p. 8) that it is impossible for plaintiff to state with precision the exact amount of property so illegally omitted from assessment, but that such property as was assessed by the assessor was so assessed at not to exceed 20 per cent of its actual value, whereas plaintiff's property was assessed at not less than 33⅓ per cent of its actual value; that said undervaluations, omissions, and illegal allowance of exemptions by the assessor were not due to any error of judgment made in good faith, but were deliberately and systematically made and done, with the consent and connivance of the other officers of Weld County, and (p. 9) with the intent of compelling the plaintiff to pay a grossly high, unequal, and disproportionate share of taxes, and with the purpose and intent that all taxpayers in said county, save and except those whose property was assessed and assessable by the State Tax Commission, should escape the payment of an equal and just share of said taxes; that said acts and doings were not occasional and casual, but, on the contrary, had been consistently, continuously, and in violation of law carried on in said County of Weld

by the assessor and other county officers for many years, systematically, deliberately, and continuously, with the purpose and intent, and in past years with the result, of placing upon plaintiff, and others whose property was assessed by the State Board of Equalization, and by its successor, the State Tax Commission, an excessive, unjust, and unequal burden of taxation, and to enable owners of property in said county, assessable locally, to escape their just and fair proportion of the burden of taxation.

It alleges that said tax for the year 1912 is illegal and excessive to the extent and in the proportion that one-third of the actual value of plaintiff's property (the rate at which it was assessed by the State Tax Commission) exceeds one-fifth thereof (the rate at which the county assessor assessed other property), and that the county officers are threatening to, and will unless prevented, collect the entire tax, including the excessive and illegal part.

It sets forth (p. 10) the total assessed valuation in Weld County for the year 1912, including both property locally assessed and that assessed by the State Tax Commission, at $20,438,710, the assessment of plaintiff's property in said county at $2,613,250, and the assessment of other property in said county by the State Tax Commission at $2,404,250, making a total assessment in said county by the State Tax Commission of $5,017,500; avers the total assessment by the assessor to have been $15,941,810, from which the assessor deducted $520,600 on account of exemptions as aforesaid, leaving a balance of local assessments of $15,421,210; and avers that the actual value of the property assessed by the assessor was at least five times the amount stated above, and that the deduc-

tions made on account of exemptions were at least five times as great as they should have been.

It alleges (pp. 10 and 11) that, by the application of the tax levies for county, school, city, and town purposes to said assessment of plaintiff's property, a tax arises and is claimed to be due from plaintiff of $77,818.41, which exceeds by at least $31,127.37 the amount which plaintiff should pay; that to enforce the collection of said excessive and illegal amount would be to deny to plaintiff the equal protection of the law, and deprive plaintiff of its property without due process of law; that plaintiff is and at all times has been willing to pay the undisputed portion of said tax, to-wit, $46,691.04, and (p. 11) has heretofore tendered the same; and it appears by the supplemental bill (p. 32) that prior to the hearing on application for injunction this sum was actually paid without prejudice.

It alleges (p. 12) that all of its property in Weld County is an essential and inseparable portion of its railroad transportation system, and that any distraint or seizure thereof or interference therewith would work irreparable injury to plaintiff in its capacity as a common carrier; that warrants are already issued, and are in the hands of the county treasurer and sheriff of the county, for the collection of said illegal tax and for the distraint of plaintiff's property for that purpose, and that, unless prevented, said county officers will at once seize and distrain, and otherwise enforce the collection of said illegal tax by sale of said property or otherwise; that such procedure will seriously hamper and interfere with the operation of the railroad, the running of trains thereon, the convenience and safety of the traveling public, the per-

formance of plaintiff's duties as a common carrier of freight and passengers and as a carrier of the United States mails, and will otherwise inflict irreparable damage.

It alleges (p. 13) that, if said excessive and illegal tax be collected from plaintiff or its property, or paid by plaintiff, plaintiff would have no full, complete, or adequate remedy at law for its recovery; that it could never be fully recovered; that no part thereof could be recovered except by a multiplicity of suits; that as soon as paid or collected it would be immediately distributed to the state, to the County of Weld, and to the various school districts, cities, and towns therein, from which it could never be collected; that there are not and never will be any funds in the treasury of Weld County or of any of said subsidiary municipalities for the repayment thereof; that the ordinary revenues would not suffice; that none of the officers of said county or said subsidiary municipalities would ever voluntarily levy a tax for the purpose of repaying the same, and that, if plaintiff ever succeeded in recovering back any portion of said tax, it would only be after extensive, long, and vexatious litigation and a multiplicity of suits.

It alleges (pp. 14-16) that in due time it filed with the State Tax Commission, and likewise with the State Board of Equalization, its petitions, which are set forth in the bill, seeking a correction of the assessment to prevent the wrongs here complained of, but that said petitions were ignored, and no hearing allowed or action taken thereon either by the State Tax Commission or the State Board of Equalization.

The answer (pp. 21-29), briefly summarized, admits the existence of the tax, the fact that the county

and its officers are insisting upon the payment of the same, and that they will, unless prevented by the court, proceed to collect said tax by distraint, seizure, sale, or otherwise, in accordance with the methods provided for the collection of taxes by the statutes of Colorado. It admits (p. 22) the requirement of uniformity in taxation, and further admits the making and existence of the agreement whereby, to insure such uniformity, all property was to be assessed, both by the State Board of Equalization, and its successor, the State Tax Commission, and by the county assessors, including the assessor of Weld County, at 33⅓ per cent of its actual value; but it denies that in 1912 the State Tax Commission assessed the property within its jurisdiction at 33⅓ per cent of its full value, but, on the contrary, avers that the State Tax Commission assessed such property at not to exceed 19.8 per cent of its full value. It denies (p. 23) that the assessor of Weld County in 1912 assessed property in his jurisdiction at a rate of not to exceed 20 per cent of its actual value, but, on the contrary, avers that he assessed the same at a rate of not less than 33⅓ per cent of its actual value. It denies (p. 23) the allowance of exemptions by the assessor in an excessive or illegal amount. It denies (pp. 23 and 24) any collusion by the assessor with other county officers, or any intent on his part, to undervalue property subject to his jurisdiction, or to assess the same at a less rate than 33⅓ per cent of its actual value, and avers that the assessor did actually, in the year 1912, assess all property subject to his jurisdiction at said rate of 33⅓ per cent of its actual value. It denies (pp. 24 and 25) the omissions from assessment averred in the bill. It denies (pp. 25-27) all wrong-

ful intent and all systematic, intentional, continuous, or illegal undervaluation or omission of property. It denies (pp. 26 and 27) that said tax or any part thereof is illegal or excessive. It admits and alleges (p. 27) that, unless said tax be paid in full, Weld County and its officers will proceed at once to collect the same in accordance with the statutes of the state. It denies (pp. 28 and 29) that plaintiff is without adequate remedy at law, and, on the contrary, avers that it has an adequate remedy at law under the statutes of the State of Colorado, consisting in the payment of said tax to the treasurer of Weld County, and subsequent proceedings to recover the same back. And the answer concludes with a motion to dismiss, based upon the assertion that the bill does not state facts sufficient to constitute a cause of action, and that it appears upon the face of said bill that the plaintiff has a plain, adequate, and speedy remedy at law.

The plaintiff (p. 20) made application for a temporary injunction to maintain the *status quo* and prevent its property from being seized, sold, or otherwise interfered with until the rights of the parties could be finally determined. The motion came on for hearing upon the bill, supplemental bill, answer, affidavits for plaintiff (pp. 32-95, 121), affidavits for defendants (pp. 96-104), certain oral testimony, which has been reduced to narrative form under the new rule (pp. 193-395), exhibits introduced in connection therewith (pp. 106-182), and a stipulation respecting the use in evidence, both in the trial court and in this court, of the official report of the United States census for 1910 (p. 184). At the conclusion of the hearing (p. 184) the court denied the application for injunction. From this order an appeal to the Circuit Court

of Appeals was prayed and allowed (pp. 184-186). Thereupon plaintiff filed its petition for a restraining order to maintain the *status quo* and to remain in effect pending the appeal (p. 187). This petition was granted (p. 188), and the restraining order, which is still in effect, issued and served (pp. 190-191).

Proceedings in the Circuit Court of Appeals.

The appeal was duly prosecuted, and on October 12, 1914, the Circuit Court of Appeals announced its decision thereon. This opinion is reported in 217 Fed., page 540. The court did not examine or pass upon the question of the validity or invalidity of the tax. It held that because of a statute of the State of Colorado which, as construed by the Circuit Court of Appeals, gave the right to recover the taxes back after payment if the same were illegal or invalid, equity had no jurisdiction of the cause. The learned court below regarded said Colorado statute as one which provided an exclusive remedy and, by implication, prohibited any resort to equity.

It therefore held that the courts, even the federal courts, could not inquire into the adequacy of the remedy thus provided by the state statute, but must refuse to exercise jurisdiction in equity; that the only action which could be brought was an action to recover back the taxes after payment, and that inasmuch as the taxes in dispute had confessedly not been paid, no action, either at law or in equity, would lie. The court concluded its opinion with the following words (217 Fed., 546):

> "We decline therefore to express any opinion touching the validity of the tax. That issue must be determined in an action under the statute."

In due time a petition for rehearing was filed, supported by a brief. On February 12, 1915, this petition was denied and an opinion thereon was filed, which is reported in 222 Fed., page 651. A majority of the court expressly adhered to the former opinion, again deciding that the present suit could not in any event be maintained, and concluding the opinion upon rehearing as follows (222 Fed., 659):

> "As the plaintiff has not paid its tax, it has no standing in any court, either of law or equity, to have the amount of its refund, if any, ascertained. We have carefully examined the petition for rehearing and find in it no cause to modify our opinion. It is therefore denied."

In a specially concurring opinion, however, His Honor, Judge Hook, while agreeing in the result, apparently dissented from the reasoning of the majority of the court by which it had been reached. Among other things, Judge Hook expressly held that the question as to whether the remedy at law supposed to have been given by the Colorado statute was plain, adequate and complete was one which the federal court must determine for itself, and that the state statute could not foreclose the consideration of such a question. In concluding his specially concurring opinion Judge Hook said (222 Fed., 659).

> "In the case at bar I would feel constrained to follow the decision in Atchison, T. & S. F. Co. v. Sullivan, 173 Fed., 456; 97 C. C. A., 1, were it not for the later case of Singer Sewing Machine Co. v. Benedict, 229 U. S., 481; 33 Sup. Ct., 942; 57 L. Ed., 1288, and it is with some hesitation that I conclude that the latter rules the sufficiency of the remedy at law in Colorado in a case like that set up in the bill of complaint."

The decision of the Circuit Court of Appeals amounted, therefore, to a final determination of the case. It was tantamount to a direction to the court below to dismiss the bill, because, as the Circuit Court of Appeals expressly said, it could not under any circumstances be maintained. Upon remand of the case pursuant to this decision the trial court could take no step except to forthwith dismiss the bill. Although the appeal was from an interlocutory order only, the Circuit Court of Appeals, in deciding as it did, and so bringing the case to a conclusion, exercised a power which it undoubtedly possessed, although its decision might be wrong.

> City of Denver v. New York Trust Co., 229 U. S., 123, 136.
>
> United States Fidelity and Guaranty Co. v. Bray, 225 U. S., 205, 214.
>
> Harriman v. Northern Securities Co., 197 U. S., 244, 287.

Thereupon the Railroad Company prayed an ap-

peal to this court, which was allowed, in accordance with what seems decisive authority.

United States Fidelity and Guaranty Co. v. Bray, 225 U. S., 205, 206, 213, 214, 215.

In aid of said appeal, and in view of the fact that the collection of the disputed taxes, which was threatened and imminent, would terminate the suit, without regard to its merits, the Railroad Company petitioned for and the Circuit Court of Appeals entered an order continuing in effect the restraining order theretofore entered by the trial court, prohibiting any attempt to collect the disputed taxes during the pendency in this court of proceedings to review the decision (P. R., pp. 426, 427).

Proceedings in This Court.

In due time the appeal from the Circuit Court of Appeals was perfected and the record lodged here.

On January 31, 1916, within the year following the denial by the Circuit Court of Appeals of its petition for rehearing, the Railroad Company, upon full compliance with the rules of this court pertaining to such matters, filed herein and duly presented its petition and supporting brief seeking the writ of certiorari to review said decision of the Circuit Court of Appeals, and on February 21, 1916, this court entered its order deferring action upon said petition for certiorari until the case was reached for argument upon the appeal.

The petition for certiorari was filed, out of an

abundance of caution, not because of lack of confidence in the propriety of the appeal, but to supplement said appeal, to the end that because of the importance of the decision a review thereof might certainly be had by one or the other method. Under the conditions recited above it seems clear that unless such review be now had, either upon appeal or by certiorari, no review by this court can ever be had.

Metropolitan Water Co. v. Kaw Valley Drainage Dist., 223 U. S., 519, 520, 523, 524.

Brown v. Alton Water Co., 222 U. S., 325.

The course pursued by appellant and petitioner as outlined above has received the sanction of this court on numerous occasions.

Pullman's Palace Car Co. v. Central Transportation Co., 171 U. S., 138, 144, 145.

American Sugar Refining Co. v. New Orleans, 181 U. S., 277, 279, 283.

Security Trust Co. v. Dent, 187 U. S., 237, 239.

Farrell v. O'Brien, 199 U. S., 89, 93, 99, 101.

Cochran v. Montgomery County, 199 U. S., 260, 263, 270.

Whitney v. Dick, 202 U. S., 132, 134, 135.

Montana Mining Co. v. St. Louis Mining Co., 204 U. S., 204, 208, 212, 213, 214.

White-Smith Music Co. v. Apollo Co., 209 U. S., 1, 8.

The petition for certiorari and the briefs supporting and opposing said petition remain on file in this cause and will, of course, receive due consideration if the question of issuing said writ becomes important.

SPECIFICATION OF ERRORS.

The errors relied upon are set forth in the assignment thereof which appears in the printed record at page 421. The errors so assigned are specific, and therefore rather numerous, the effort being to point out the error claimed to exist in each step in the court's reasoning. The errors, however, fall naturally into certain general classes, and for the purposes of this brief may properly be summarized as follows:

1. The court erred in holding that this cause was not within the jurisdiction of a court of equity.

2. The court erred in holding that a remedy afforded by a state statute, however comprehensive and complete, could oust the jurisdiction of a federal court of equity, when invoked upon the ancient and well settled grounds recognized in the High Court of Chancery of England in 1789, at the time of the adoption of the judiciary act, such as relief against fraud, removal or prevention of cloud upon the title to real estate, avoidance of a multiplicity of suits, and the like.

3. The court erred in holding that because of the existence of the Colorado statute a federal court of equity was precluded from considering or determining whether the remedy, if any, afforded by said statute was in fact plain, speedy, adequate or complete.

4. The court erred in holding that said statute of Colorado afforded any remedy at law whatsoever.

5. The court erred in assuming that the remedy, if any, afforded by the Colorado statute was under the circumstances of this case so plain, speedy, adequate and complete as in any event to oust the jurisdiction of equity.

6. The court erred in renouncing jurisdiction in equity, and in refusing to consider the question of the probable invalidity of the taxes in dispute and the propriety from that point of view of preliminary injunctive relief.

7. The court erred in affirming the order of the trial court denying the preliminary injunctive relief.

8. The court erred in directing in effect the dismissal of the bill.

ARGUMENT.

I.

EQUITY JURISDICTION.

The Circuit Court of Appeals in both of its opinions deals solely with the question of equity jurisdiction. It holds distinctly that the federal court has not and cannot have jurisdiction in equity of this cause. The principles which it enunciates, and which lead it to this conclusion, are of supreme importance and widespread effect. With the utmost respect, we venture to assert that they are novel and startling. We earnestly contend that they are erroneous.

The Circuit Court of Appeals bases its conclusion largely upon what it deems to be decided by this court in *Singer Sewing Machine Co. v. Benedict*, 229 U. S.,

481. But we contend, respectfully, but most earnestly, that the learned court below has inadvertently misconceived the scope and effect of the decision of this court in the Singer Sewing Machine case. That this is true is, we think, apparent from the language and reasoning employed and the authorities cited by this court, and the extreme care which it exercised to limit its decision in the Singer Sewing Machine case to the facts appearing in that record.

Moreover, in *Johnson v. Wells Fargo & Co.*, 239 U. S., 234, decided November 29, 1915, nearly a year after the Circuit Court of Appeals in the instant case had denied our petition for rehearing, the limitations as an authority of Singer Sewing Machine Company v. Benedict, supra, were plainly pointed out (page 244), its inapplicability to such a case as this determined, and relief in equity from an illegal tax afforded, under circumstances which we believe to be indistinguishable from those presented in the case at bar. It is our firm belief that if Johnson v. Wells Fargo & Co., supra, had been decided by this court before the Circuit Court of Appeals made final disposition of this case the result herein would have been different.

The holding of the Circuit Court of Appeals in the case at bar is, as we respectfully submit, in direct conflict with repeated prior decisions of the same court. See:

Atchison, T. & S. F. Ry. Co. v. Sullivan, 173 Fed., 456 (a case originating in Colorado).

Singer Sewing Machine Co. v. Benedict, 179 Fed., 628 (also a case originating in Colorado).

Western Union Telegraph Co. v. Trapp, 186 Fed., 114, 121.

Ritterbusch v. Atchison, T. & S. F. Ry. Co., 198 Fed., 46.

Wells Fargo & Co. v. Johnson, 214 Fed., 180, 188.

Unquestionably the court's ruling in the present case was made in an attempt to follow what it considered had been the decision of this court in Singer Sewing Machine Co. v. Benedict, supra. Shortly prior to its decision of this case the Circuit Court of Appeals had in Wells Fargo & Co. v. Johnson, supra, made a decision to exactly the opposite effect. Subsequent to its decision in the case at bar its prior decision in Wells Fargo & Co. v. Johnson, supra, was in all things affirmed by this court. (Johnson v. Wells Fargo & Co., 239 U. S., 234, 244.)

It follows, as we respectfully submit, that the decision of the Circuit Court of Appeals in the case at bar ought not to be permitted to stand, but should be reviewed and reversed, either upon the appeal which is pending or the writ of certiorari which is sought herein, to the end not only that the present appellant and petitioner may be relieved from what we respectfully contend is a manifest injustice, but also that the decisions upon the point involved may be clarified and made uniform for the guidance of future litigants.

Because of the circumstances recited above we shall first discuss and devote a large part of this brief to the question relating to equity jurisdiction.

1. *Analysis of the Opinions of the Circuit Court of Appeals.*

(217 Fed., 540; 222 Fed., 651.)

The Circuit Court of Appeals holds that equity is without jurisdiction of this cause. Having arrived at that conclusion, the court expressly declines to consider or determine the validity of the taxes. Plainly equity jurisdiction would have been renounced even though the court had distinctly held that the taxes were entirely invalid. We are therefore justified in approaching the subject and analyzing the opinions upon the assumption and from the point of view that the taxes are in fact invalid.

The court's conclusion is arrived at from the following process of reasoning:

1. That a statute of the State of Colorado authorizes the payment of all of the taxes of every nature which are here claimed to be invalid, and the recovery back in one action at law of all of the moneys so paid.

2. That such a state statute, by implication, prohibits resort to equity and the issue of an injunction.

3. That such a state statute likewise prohibits even a federal court of equity from investigating and determining the question as to whether the remedy thereby afforded is in fact plain, speedy, adequate, complete, and in all respects efficient.

4. That such a state statute is effectual in a federal court of equity, annuls its power to issue an injunction against the collection of an invalid tax, and in suits relating to such matters destroys the equity jurisdiction of the federal court, even though that jurisdiction be founded upon an ancient and well settled ground, such as relief from fraud, removal or

prevention of cloud upon the title to real estate, avoidance of a multiplicity of suits, or other like matter.

The court's decision is tantamount to the declaration that in the State of Colorado—as well as in every other state having a statute similar to that of Colorado, as the same is construed by the court—no case involving relief from an invalid tax can be entertained by a federal court of equity, and that under no set of circumstances which can be readily conceived can an injunction be issued to prohibit the collection of such an invalid tax. Logically the same result must follow in those states where the right to recover back in an action at law is established, not by a statute, but by the decisions of the state courts, for in either event the right is given by the law of the state, and it can certainly make no difference whether that law is declared by statutory enactment or by court decision.

That a federal court of equity can be so stripped of its authority, its ancient jurisdiction so limited, and its power to relieve injured suitors who, by reason of diversity of citizenship or other cause recognized by the law of the nation, have a right to litigate in the national courts, so utterly destroyed, and that all this can be done by a statute of a state, is a doctrine which, we respectfully submit, is both novel and startling. Its mere statement is sufficient to at once challenge the most serious attention.

If its effect were confined to the case at bar, the result of the decision, if it be wrong, would, in view of the large interests here involved, be sufficiently harmful to demand the most conscientious reconsideration of the question as to whether it be right. This decision, if adhered to, will, of course, conclude the

present litigation, requiring the plaintiff to pay an illegal tax amounting now to over forty thousand dollars, or suffer wrongs which it is the special province of equity to relieve from, and, if it pays, thereafter to enter upon a hopeless struggle to get back what it can, with the certainty that all can never be recovered back; with the great probability that none of it can ever be recovered, and with the absolute knowledge that any recovery whatever can only be had at the expense of a multiplicity of suits and other intolerable conditions, which render the supposed remedy totally inadequate. We think the remedy to which we are remanded is non-existent. We submit, respectfully, but with the utmost confidence, that it is in any event not such a plain, speedy, adequate, complete and efficient remedy as to oust equity of jurisdiction.

But the effect of the decision complained of is not confined to the case at bar. If adhered to, it inaugurates a new practice, and enunciates a doctrine which, we respectfully submit, has never before prevailed, even in the State of Colorado, and certainly not in the federal courts, whether in the Eighth Circuit or elsewhere. The doctrine is, we submit, in conflict with repeated decisions of this court, and likewise in conflict with prior decisions of the same Circuit Court of Appeals. The rule heretofore steadily adhered to by all of these courts, as we read their decisions, has been that, in spite of such a state statute, whenever a case stood within any of the recognized heads of equity jurisdiction, such as removal or prevention of cloud upon title, relief from fraud or repeated trespass, avoidance of a multiplicity of suits, or other like ground; or whenever, even in the

absence of this, the suitor had not a plain, certain and indubitable remedy at law whereby he could obtain full, complete, adequate and speedy relief, equity would take jurisdiction and enjoin the collection of an invalid tax imposed by authority of the state. Upon this principle equitable and injunctive relief has been repeatedly administered in such cases, even by the state courts of Colorado. Such relief in such cases has likewise been repeatedly administered by the federal courts, sitting in Colorado and elsewhere, and the propriety of such action affirmed by the circuit courts of appeals and by this court.

There are now pending in the District Court of the United States for the District of Colorado, on the equity side thereof, a number of cases involving alleged illegal taxes to a very large amount, and presenting the same question which has been here determined. There are now pending in various trial courts of the State of Colorado a considerable number of such cases. This court has recently decided a suit in equity of like character, coming here from the Colorado Supreme Court, wherein jurisdiction in equity was entertained and injunctive relief administered by the State District Court for the City and County of Denver, wherein also such equity jurisdiction was unquestioned by the Supreme Court of the State, and wherein the questions decided by this court related solely to the validity of the tax, and jurisdiction in equity was regarded as indubitable. (*Bimetallic Investment Co. v. State Board*, 239 U. S., 441.)

If the doctrine of the present decision be followed in the other litigation mentioned, and if it be erroneous, enormous injustice will be done to numerous other litigants, who have up to this time followed the course

prescribed by all previous decisions. Moreover, if the present decision be correct, then all of the numerous injunctions heretofore issued in Colorado, by both the state and federal courts, to restrain the collection of illegal taxes have been unlawfully issued.

In the discussion which follows, the first opinion of the Circuit Court of Appeals (217 Fed., 540) is chiefly referred to. This is so because in that opinion the court set forth its reasons for the decision. In the opinion on rehearing (222 Fed., 651) these were not modified or materially amplified. It is significant, however, that upon rehearing (222 Fed., 659) one of the judges expressed grave doubt as to the correctness of the decision.

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2. *The Colorado Statute affords no remedy at law. In any event the remedy, if any, arising therefrom is not so plain, speedy, adequate and complete as to oust the jurisdiction of equity.*

In *Street's Federal Equity Practice*, Vol. 1, section 40, page 28, the learned author says:

> "Before a remedy at law can be said to be adequate, in such sense as to exclude the jurisdiction of the court of equity, it must appear that the remedy afforded by the court of law is as certain, as complete, as prompt, and as efficient, to attain the ends of justice, as the remedy in equity. The remedy at law must be adequate, and its adequacy must be so apparent as to leave no reasonable doubt that the proper remedy is at law and not elsewhere. The question is not whether there is

> some sort of a remedy at law, but whether it is plain, adequate, and complete. Equity jurisdiction may be invoked though there is a remedy at law, unless the remedy at law, both in respect of the final relief and the mode of obtaining it, is as efficient as the remedy in equity."

In *Boyce v. Grundy*, 3 Pet., 210, 215, this court said:

> "It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity."

The same doctrine has since been repeatedly enunciated and is the guiding rule by which jurisdiction in equity is determined. The certainty and completeness of the remedy at law are just as essential as its efficiency and ultimate adequacy. If there be a reasonable doubt as to the existence, the scope, the certainty, or the completeness of the remedy at law, equity will retain jurisdiction.

In *Kilborn v. Sunderland*, 130 U. S., 505, this court held that equity jurisdiction may be invoked although there is a remedy at law, unless the remedy at law, *both in respect of the final relief and the mode of obtaining it*, is as efficient as the remedy in equity.

In *Davis v. Wakelee*, 156 U. S., 680, 688, we find these words:

> "It is a settled principle of equity jurisprudence that if the remedy at law be doubt-

> ful a court of equity will not decline cognizance of the suit. * * * Where equity can give relief, plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law."

Until its decision in the case at bar, no court has more firmly enforced or more strictly adhered to the rule above stated than the Circuit Court of Appeals for the Eighth Circuit.

> A. T. & S. F. Ry. Co. v. Sullivan, 173 Fed., 456, 457.
>
> Wells Fargo & Co. v. Johnson, 214 Fed., 180, 189.
>
> Springfield Milling Co. v. Barnard &c. Co., 81 Fed., 261, 265.
>
> Brown v. Arnold, 131 Fed., 723.
>
> Williams v. Neely, 134 Fed., 1, 10.
>
> Monmouth Investment Co. v. Means, 151 Fed., 159, 165, 166.

In the case last cited the court, with the citation of abundant authority, held that any doubt as to the efficacy of the remedy at law should be resolved in favor of the jurisdiction of the court of equity.

We respectfully submit that in the case at bar the learned court below approached the consideration of the subject here under discussion from a radically wrong point of view. It applied a rule in conflict with the settled doctrine repeatedly enunciated in the decisions of the Supreme Court and in its own prior decisions. It held that because, as it conceived, the remedy in question had been provided by a state stat-

ute, which by implication made it exclusive, therefore it does not "lie with the courts to say that the remedy which the legislature had provided is inadequate, and that the remedy which it has condemned shall therefore be continued," and that "The courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the remedy which it takes away," and that "the judgment of the legislature upon that subject must control." (217 Fed., 544.)

In our previous briefs and in our oral argument we had pointed out the many difficulties, doubts and uncertainties which beset the statutory remedy, even if it exists at all. It is evident that the court has swept aside these contentions upon the doctrine, which we submit is erroneous, not only that all doubt should be resolved against the jurisdiction of equity and in favor of the existence and adequacy of the remedy at law, but that the mere fact that the remedy is afforded by a statute of the state forecloses all inquiry as to its adequacy, certainty or completeness.

We respectfully but most earnestly contend, first, that the statute of Colorado affords no remedy at law whatsoever; second, that, if it does, the remedy thus afforded is certainly not so plain, speedy, adequate, complete or efficient as under the circumstances presented by this record should suffice to oust equity of its jurisdiction.

(a) *The Colorado statute as now framed does not afford any right which may be enforced by an action at law.*

The Colorado statute in question has been several times amended. As originally enacted, and as it stood at the time of the decision of the Colorado cases

referred to in this court's opinion in Singer Sewing Machine Co. v. Benedict, 229 U. S., 481, it was as follows (2 Mills' Ann. Stat., Sec. 3777):

> "In all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous or improper assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same, without abatement or discount, to the taxpayer."

But in 1902 there was a complete revision of the revenue laws of Colorado, and as the law now stands it provides (Session Laws 1902, p. 146, sec. 200; Rev. Stat. 1908, sec. 5748):

> "The auditor of state shall allow to each county treasurer, who shall be allowed to take, credit for the amount of state tax that may have been from time to time refunded to the taxpayer as double or erroneous assessments, or refunded to the purchaser of real estate erroneously sold."

And further (Session Laws 1902, p. 146, sec. 202; Rev. Stat. 1908, sec. 5750):

> "COUNTY RESPONSIBLE FOR STATE TAXES."
>
> "5750. Each county is responsible to the state for the full amount of tax

levied for state purposes, excepting such amounts as are certified to be unavailable, double or erroneous assessments, as provided in this act, and in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors or irregularities, the board of county commissioners shall refund the same, without abatement or discount, to the taxpayer."

There is no other provision of the Colorado statute relating to refunds, and none whatever providing for the payment of taxes under protest, the holding of the same in a separate fund, the bringing of action to recover the same, or other provision in aid of such recovery.

Prior to the commencement of this suit, the following statute became effective (Session Laws 1913, p. 528):

"Section 5. No abatement, rebate or refund of taxes shall be allowed by the county commissioners, unless a hearing shall be had thereon and a notice of such hearing and an opportunity to be present being first given to the assessor, and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado Tax Commission their findings, giving the amount of such

> abatement, rebate or refund, and their reasons therefor, and such abatement, rebate or refund shall become effective upon the endorsement thereon of the approval of the Colorado Tax Commission and in case the said Colorado Tax Commission shall disapprove the recommendations of the county commissioners, they shall endorse their disapproval thereon and return it to the county commissioners with a statement of their reasons therefor and no abatement, rebate or refund of taxes shall be allowed by the said board of county commissioners if the application is disapproved by the said Colorado Tax Commission."

The court will observe that the statute says nothing about an action at law or other procedure in court. It empowers the board of county commissioners to consider claims for tax refunds of county and state taxes only, and doubtless empowers them to make refund of such taxes if they shall be found by the county commissioners to be erroneous or illegal. The only right granted to the aggrieved taxpayer by this statute is a right to complain to the board of county commissioners. Neither by this statute nor by any other statute of Colorado is any provision made for a suit against the board of county commissioners, against the collecting officer, or against anyone else, for the recovery back of money paid on account of an invalid tax. There is no provision respecting payment under protest, retention of the fund until determination of the suit, or prompt bringing of the action, all of which were present in the Tennessee and Indiana

statutes referred to by the court, but all of which are conspicuously absent from the Colorado statute. So far as the language of this statute is concerned, it gives no right which is enforceable in an action at law, or in any other form of legal proceeding. To the best of our knowledge, no court in Colorado has ever permitted a recovery against a board of county commissioners under this statute. We are confident that no such recovery has ever been permitted since the revision of the statute in 1902. We can affirm with positive conviction that in no case in Colorado has a plaintiff been permitted to recover against a board of county commissioners of a county for moneys paid in discharge of city, town, or school district taxes. If any right exists in Colorado to recover back such tax in an action at law, it is not, and cannot be, based upon this statute. It must be the common-law right to recover back that which is exacted illegally and by duress. If so, it must be governed by the principles of the common law, and suit must be brought, and recovery must be had, not against the board of county commissioners of the county—except as to county, and possibly as to state, taxes—but against the respective municipal entities whose tax it was and by whose agent it was collected.

But by Section 5 of the act of 1913 quoted above, the power of the county commissioners to allow any abatement, rebate or refund of any taxes whatever was taken away. They were relieved of all duty in that regard, and it was provided that no such abatement, rebate or refund of such taxes should be allowed except upon the written approval of the State Tax Commission, to which all petitions for that purpose must be referred. As no method is provided by which

the State Tax Commission can be required to approve, and no provision is made for appeal to the courts from a refusal to approve, it follows that the remedy, if any, heretofore provided by the statute, no longer exists. It also follows that it is now impossible to recover from the county any taxes alleged to have been erroneously or illegally collected, since the county, through its commissioners, is under no obligation and has no power to refund them. If the State Tax Commission refuses to permit a refund, it is not the fault of the county commissioners of the county, and no cause of action against them arises because of such refusal. Against whom, then, should the suit be brought?

The Circuit Court of Appeals, however, decided (217 Fed., 542, 543) that the statute of 1913 had no application here for the following reasons: (a) because said statute of 1913 did not apply to any refund authorized by section 5750 of the Revised Statutes; (b) because the statute of 1913 did not apply to any refund of any taxes arising from the application of the levies to the assessment of 1912. With the utmost respect, we venture to assert that the learned court below was mistaken in both premises, and that therefore its conclusion was erroneous. The learned court below held that the statute of 1913 "has nothing to do with the subject embraced in section 5750. It is confined wholly to the administrative functions of county commissioners." But the statute of 1913 is general in its terms, expressly applies to every rebate or refund of taxes, and expressly prohibits the allowance by county commissioners of any such rebate or refund except by consent and with approval of the State Tax Commission. So far as language can bring it about,

said statute of 1913 plainly includes refunds authorized by section 5750. Moreover, said section 5750 is the only Colorado statute within our knowledge which purports to authorize a refund of taxes by the county commissioners. The other Colorado statutes referred to by the learned court below (217 Fed., 542) do not refer to refunds or rebates of taxes theretofore paid, but to the abatement or reduction of taxes prior to their payment. It is therefore inevitable, as it seems to us, that the statute of 1913 in referring to the "rebate or refund of taxes" covers the refund or rebate authorized by section 5750. Otherwise it would have no meaning, because there would be nothing upon which it could operate.

The other premise upon which was based the conclusion that the statute of 1913 is inapplicable is, we respectfully submit, equally fallacious. The reasoning of the learned court below was that to permit the statute of 1913 to operate upon taxes arising from the assessment of 1912 would be to give it a retrospective operation, contrary to a settled canon of construction which forbids such result. But although the assessment or valuation of the property was made in 1912, the taxes arising therefrom did not come into being until 1913. Moreover, the taxes here in dispute have never been paid. No cause of action for the recovery thereof by the injured taxpayer can arise until they have been paid. This the Circuit Court of Appeals expressly holds in the case at bar (217 Fed., 546; 222 Fed., 659). The statute of 1913 has been in effect since a date early in that year. It follows that when, if ever, these disputed taxes are paid, the cause of action, if any, for the recovery thereof will be created at that moment and by that act. Such cause of action does not exist at the present time, nor has it existed at

any time heretofore. It was not created by the assessment, by the levy or by the extension of the taxes upon the tax roll. It may never come into existence, but if and when it does the statute of 1913 will then be, and for a long time prior thereto will have been, the law of Colorado and will, as we respectfully assert, necessarily condition proceedings upon causes of action arising after its effective date. This view of the statute, which seems to have been overlooked by the learned court below, gives it a prospective, and not a retrospective, operation. It permits the new statute to operate upon causes of action created after its enactment—not upon those existing before it became effective.

Moreover, such a statute, relating, as it does, to matters of remedy and procedure only, would not be retrospective and therefore offensive to the canon of construction adverted to above. It does not destroy any cause of action or other substantive right existing prior to its passage; it merely varies the procedure by which such right, if any, may be enforced. The distinction between statutes of this nature and those relating to substantive vested rights is clearly drawn.

Perry vs. Denver, 27 Colo., 93, 96.

People vs. District Court, 28 Colo., 162, 164.

Campbell vs. Iron Silver Mining Co. (C. C. A., 8th Cir.), 83 Fed., 643, 645.

Ashenfelter vs. Carpenter, 37 Colo., 534.

Sutherland on Statutory Construction, Sec. 482.

Sohn vs. Waterson, 17 Wall., 596, 598.

From this point of view the case is readily distinguishable from those cited by the learned court below (217 Fed., 543). Those decisions were made in cases where the attempt was to so construe a statute as to make it operate upon an existing status, and thereby to destroy existing substantive rights which were in existence before and at the time of the enactment of the statute. *Union Pacific R. R. Co. v. Laramie Stock Yards Co.*, 231 U. S., 190, is fairly illustrative of this.

In this connection we should emphasize the view taken by the learned court below (217 Fed., 542) of the effect of said section 5750 of the Revised Statutes. The Circuit Court of Appeals holds that after payment of the disputed taxes it is quite unnecessary under said section 5750 to apply to the county commissioners for refund before bringing suit. The view of the learned court below is that the mere existence of said section 5750 authorizes the maintenance of such an action at law; that in such suit the question as to whether the taxes paid are erroneous or illegal is to be determined, and that if they are thereby "found to be erroneous or illegal" and judgment is entered for the recovery of the money paid in their discharge, then, for the first time, application is to be made to the board of county commissioners, and by said section 5750 the board is required to pay the judgment. With the utmost respect, we venture to assert that such a construction is not justified by the language of section 5750. It is not supported by any Colorado decision which a most careful research has disclosed. On the contrary, the decisions of the Colorado courts have referred to said section 5750, not as giving a right which could be enforced by suit before applica-

tion to the county commissioners for refund and denial thereof, or even as giving a right to sue under any circumstances, or at all, but only as giving a right to go to the county commissioners for relief. As to what might be done in case the county commissioners improperly denied relief the Colorado decisions are silent.

Moreover, the view taken by the learned court below seems to be in conflict with that expressed by this court in *Singer Sewing Machine Co. v. Benedict*, 229 U. S., 481, 487, for this court, speaking upon the same subject, said that if the taxes in question were illegal and void, the company "could pay them and, *if the commissioners refused to refund*, have its action against the county to recover back the money." Plainly, according to the view of this court application to and denial by the county commissioners is an essential pre-requisite to the maintenance of suit. But since the statute of 1913 was passed county commissioners have no power, and therefore can be under no duty, to refund. Surely no cause of action can arise against them, or against the county, for their refusal to do that which the statute prohibits them from doing.

(b) *Whatever right is afforded by the statute, it does not relate to city, town or school district taxes.*

It will be observed that section 5750 consists of but one sentence. The subject dealt with, as shown by the title of the section, is "state taxes." The section makes each county responsible to the state for the full amount of taxes levied for state purposes, except such as are certified to be "unavailable, double or erroneous assessments," and as to these it gives the

county commissioners the right to refund to the taxpayer. The general subject, and the first subject, referred to in the sentence which constitutes this section of the statute is "state taxes." By a well-settled canon of construction, commonly known as the doctrine of *ejusdem generis*, it is declared that where in a statute words of general follow words of particular import, the words of general import must be held to relate to such things as are within the class described by the words of particular import. This is especially true where, as here, the words occur in the same sentence.

Sutherland, Statutory Const., secs. 268-276.

It must, therefore, be that the provision of section 5750 relating to refunds applies only to the refunding of state taxes. And whether, by virtue of that section, a right to bring an action at law to recover was or was not conferred upon the taxpayer; and whatever right, if any, he obtained thereby, the subject dealt with, and the right, privilege, or authority conferred, was confined to state taxes, or, at most, to state and county taxes. Certainly it did not relate to city, town, or school district taxes, with which boards of county commissioners have nothing whatever to do. If the statute had purported to authorize boards of county commissioners to refund city, town, and school district taxes, and so, by implication, had authorized actions at law against them to recover the same, the statute would have been in conflict with the state Constitution. This point will be dealt with in the next succeeding section. But, if this be true, another canon of statutory construction becomes effect-

ive. It is not even necessary to declare that a certain construction of the statute would render it unconstitutional. It is sufficient if, under such construction, its validity would be doubtful. The settled rule under such circumstances is that if, by any possibility, the statute is subject to any construction which would avoid conflict, or possible conflict, with the Constitution, such construction must be adopted, even though it require a straining of the language employed.

Union Pacific vs. Laramie Stock Yards, 231 U. S., 190, 200.

United States vs. Delaware & Hudson Co., 213 U. S., 366, 408.

Harriman vs. Interstate Commerce Com., 211 U. S., 407.

Here no such strain is necessary. The natural and usual import of the words employed excludes city, town, and school district taxes from the operation of the statute. If it had been otherwise, the statute must have been declared invalid.

The statutes relating to the taxes of counties, cities, towns, and school districts will be fully reviewed in the next section. The conclusion is irresistible that, unless section 5750, Revised Statutes, validly can and plainly does give a right of action against the board of county commissioners to recover from the county moneys collected for taxes, retained and expended by cities, towns, and school districts, if there be any right to recover at law at all, it must be enforced by sixty-five separate actions against the numerous cities, towns, and school districts by which

said tax will be collected and received. None of these can be in the federal court, because the amount involved in each will not permit. This alone would render them inadequate to oust the jurisdiction of a federal court of equity, without regard to their multiplicity. In the process of reasoning adopted by the court, the right of action at law against the board of county commissioners to recover the illegal tax collected arises from the provision that the board of county commissioners shall refund such tax. It must be surrounded by the same limitations. If the board of county commissioners may not refund taxes erroneously collected by cities, towns, or school districts within the county, they may not be sued because they have not made such refund. City, town, and school district taxes never come into the possession or under the control of the county or of its board of commissioners. County taxes and state taxes do. County commissioners may refund county taxes because of their general control over county affairs. They may refund state taxes out of any state moneys on hand, and take credit therefor against the state, under the express provision of said sections 5748 and 5750. There are no such provisions relating to city, town, and school district taxes. There could not be, because neither the county nor the county commissioners ever have funds of cities, towns, or school districts in their possession or under their control, out of which to make such refunds. If they attempted to use county funds for such a purpose, they could be enjoined at the suit of any taxpayer in the county; for his money would be used to defray an obligation in which he had no interest. The Circuit Court of Appeals disposes of these objections by saying (217 Fed., 545):

> "These difficulties are all of counsel's own creating. * * * As to state taxes, there is an express provision giving to the county credit, in its accounting with the state, for any taxes that have been refunded. We have no doubt that the same remedy would apply as to municipalities, and that the county treasurer could take credit in his settlements made from time to time with them for their proportion of any sum which the county was compelled to pay as a refund. * * * We cannot, from speculative reasoning as to difficulties of accounting, hold that the aggrieved taxpayer will not receive in a single suit against the county the full compensation which the law provides."

It is not a mere matter of accounting, but an utter lack of power. The procedure suggested by the court would violate specific statutory and constitutional provisions.

In Morgan vs. Pueblo and Arkansas Valley R. R. Co., 6 Colo., 478, a like question was presented. Certain bonds, and the interest thereon, were to be paid by a special tax levy. The statute required the collectors to remit the funds so collected to the state treasurer, who was to pay the coupons upon these bonds, upon presentation. A certain holder of some of these coupons tendered them in payment of his general taxes, claiming that the county treasurer should give him credit therefor on the general taxes and take credit therefor in making remittances to the

state treasurer of the funds arising from the special levy. But the court said (p. 481):

> "The county treasurer is not the disbursing officer of this fund. His whole power and duty respecting this special tax is to collect it and pay it over to the state treasurer, and holders of such coupons must apply to the latter officer for payment thereof. *It is not a question of bookkeeping, but of statute law, which is involved.* The doctrine of set-off or counter-claim does not obtain in revenue matters. With the exceptions specified in the statute, all taxes must be paid in money, and those entitled to receive funds raised by taxation must present their demands to the proper officer for payment. * * * If the special tax authorized by statute to be levied and assessed for the payment of these interest coupons as they mature, was in fact levied and collected, defendant in error has but to apply for their payment to the proper custodian of the fund; if such special tax has not been levied and assessed, the remedy is to proceed against the officers in default, to compel them to pay the tax, *but in no event can the taxes assessed and collected for county purposes be diverted to other purposes than those named in the statute.* 'To hold differently,' as said in Johnson vs. Howard and Trustee (41 Vt. 122), 'would open the way to supposable and probable complications that would tax professional and judicial wit to solve, to an extent that would not be likely to be compen-

> sated by any beneficial results that would be realized therefrom.'" (Italics ours.)

From the foregoing authority we deduce the conclusions: that the objection here presented is not a mere matter of accounting, as the Circuit Court of Appeals seems to think; that the county treasurer has the same relation to the funds which he collects under the special levies of cities, towns, and school districts as to those which arose under the special levy mentioned in the foregoing case; that his duty and sole authority in respect thereto is to remit said funds, as collected, to the various municipalities for which the collection was made; that these remittances must be made in money, and that, in the absence of statute authorizing the same, he cannot remit in receipts showing that he has used part of said money to discharge an obligation of his principal; that county funds cannot, under any circumstances, be used to discharge obligations of cities, towns, or school districts.

(c) *If the statute had expressly provided that the board of county commissioners might under any circumstances refund any city, town or school district taxes, it would have been unconstitutional.*

Article XI, section 1, of the Colorado Constitution (Rev. Stats. 1908, page 45) provides:

> "Neither the state, nor any county, city, town, township or school district shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner, to or in aid of any person, company or corporation, public or private, in any amount or for any purpose

> whatever; or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state."

Cities, towns and school districts are public corporations. By the constitutional provision quoted above a county is expressly prohibited from lending or pledging the credit or faith thereof, directly or indirectly, in any manner, to or in aid of any such city, town or school district, in any amount, or for any purpose whatever, and is likewise prohibited from becoming responsible for any debt, contract or liability of any such city, town or school district. In language which cannot be misunderstood, the County of Weld is thereby forbidden to become responsible in any way, directly or indirectly, to Union Pacific Railroad Company for any moneys theretofore wrongfully collected as taxes for any city, town or school district, and the legislature of Colorado is likewise plainly forbidden to enact any statute which might authorize such a course.

California has a statute (Sec. 3819 of the Political Code, quoted in 197 U. S., pages 109, 110) which provides that

> "The owner of any property * * * who may claim that the assessment is void, in whole or in part, may pay the same to the tax collector under protest, which protest shall be in writing and shall specify whether the whole assessment is claimed to be void, or if a part only, what portion, and in either case the grounds upon which such claim is founded; and when so paid under protest the

payment shall in no case be regarded as voluntary payment, and such owner may at any time within six months after such payment bring an action against the county in the Superior Court to recover back the tax so paid under protest."

The provisions of the Constitution and statutes of California relative to counties, cities, towns and school districts are analogous to the corresponding provisions of the Colorado Constitution and statutes. In *Pacific Mutual Life Insurance Co. v. County of San Diego,* 112 Calif., 314; 41 Pac., 423, a county was sued for taxes erroneously collected under a school district levy, but the court held that the suit could not be maintained, saying (page 315):

"The funds of the school district are not subject to the control of the county so as to allow a reimbursement of the county for the amount of the judgment, if it should be paid (Const., art. XI, sec. 16; Pol. Code, sec. 1837) and if said section 3819 of the Political Code admits of a construction which would uphold an action of this character, its constitutionality in that particular would admit of debate, for the credit of a county cannot be pledged for the payment of the liabilities of municipal or other corporations. (Const., art. IV, sec. 31.) But it was held in Elberg vs. San Luis Obispo County, decided in Department Two of this court, August 3, 1895, that said section 3819 of the Political Code was not designed to authorize the recovery from a county of illegal taxes collected for the use

and disposition of a high school district within the county. This case differs from that in no particular favorable to plaintiff. (See, also, School Dist. v. Bridport, 63 Vt. 383; Stone v. Woodbury County, 51 Iowa, 522; Taylor v. Avon Tp., 73 Mich. 604.)"

See also:

Elberg vs. County of San Luis Obispo, 112 Cal., 316; 41 Pac., 475.

In Colorado, while the county treasurer acts as the collector of all property taxes, he is not the custodian of any of the funds thus realized, except as to those which accrue to the county. The state, the county, the city, the town, and the school district each has its separate governmental organization; each is a separate entity; each holds and controls its own property and its own funds, independently of the others; and each has its own treasury and its own treasurer, who is the custodian of its moneys. The county treasurer, however, acts as collector of taxes for all of them (Rev. Stat. 1908, secs. 1436, 5672).

But as to state taxes, he must promptly remit to the state treasurer all sums of money collected for state purposes (Rev. Stat. 1908, secs. 5693, 5694, 5699), and thereupon such funds pass beyond his control, and likewise beyond the control of the board of county commissioners and other county officers.

As to the financial matters of counties, it is required that the levies for county purposes be specific and confined to certain objects named therein (Rev. Stat. 1908, sec. 1187). An annual appropriation is required, specifying the purposes for which expenditures are to be made during the year and the amount

to be expended for each purpose (Rev. Stat. 1908, sec. 1215). Expenditures are strictly limited to the several purposes and the respective amounts named, and no liability can be incurred in excess of the appropriation (Rev. Stat. 1908, secs. 1216, 1217). The county treasurer is required to pro-rate the taxes collected to the several funds (Rev. Stat. 1908, sec. 5672). The moneys belonging to the county he must pay out on order of the board of county commissioners, and not otherwise (Rev. Stat. 1908, sec. 132). He is required to keep the separate funds specified in the appropriation bill and the levy distinct from one another, and no warrants drawn on one fund can be paid out of a different fund (Rev. Stat., sec. 1324); and, in general, it may be stated that, as to county funds, he is not only the collector, but also the custodian thereof, and cannot pay them out except upon order of the board of county commissioners, and these orders are invalid unless within the appropriation for the year and upon a specific fund arising from a levy made for that purpose.

As to towns and cities, under the laws of Colorado these also are separate governmental entities, quite distinct from the state and from the county. They have power to levy and collect taxes. Each has its own treasurer, who is the custodian of its funds (Rev. Stat. 1908, sec. 6635). The city council or board of trustees of the town levies the tax (Rev. Stat. 1908, sec. 6652), which the county clerk is required to extend upon the tax list (Rev. Stat. 1908, sec. 6655). The county treasurer is required to collect the taxes arising from such levies, but cannot retain the same. He must promptly pay them over to the treasurer of the city or town (Rev. Stat. 1908,

sec. 6657), and is to be compensated for his service in collecting by the city or town (Rev. Stat. 1908, sec. 6658). Cities and towns, like counties, are required to make an annual appropriation for specified purposes, which they may not under any circumstances exceed (Rev. Stat. 1908, secs. 6631, 6632), and the city or town treasurer is required to keep a separate account of each fund or appropriation.

School districts also are separate governmental entities, acting through their respective school boards. They fix the levies for the purpose of school taxes. The county treasurer is required to collect the tax, place it to the credit of the proper district as fast as collected, and hold it subject to the order of the district board (Rev. Stat. 1908, secs. 5893, 5894, 5895). Under heavy penalty, the county treasurer is required to pay this money over to the respective school districts or disburse it upon their orders (Rev. Stat. 1908, secs. 5899, 1326, 5903). Each school district has its own treasurer, who is the custodian of its funds (Rev. Stat. 1908, secs. 5922, 5940).

From the foregoing analysis of the statutes it appears that each of these political subdivisions is independent of all others in financial matters. Each holds, controls, and disburses its own funds, which are separately kept, held, and accounted for, and none has any control whatsoever over the moneys or financial affairs of any of the others.

The statute relied upon by the Circuit Court of Appeals provides that in case of payment of an illegal tax "the board of county commissioners shall refund the same, without abatement or discount, to the taxpayer." But the board of county commissioners has nothing whatever to do with, and no control

over, the finances or the funds of any city, town, or school district in the County of Weld. The only moneys they control, and the only funds from which they could make a repayment, are the moneys and the funds of Weld County. They certainly have no power or authority to disburse the funds of Weld County for the purpose of discharging an obligation of any city, town, or school district in said county.

But the taxes in dispute are not by any means all county taxes. Less than one-half thereof are county taxes; less than one-seventh thereof are state taxes; and the balance, constituting nearly one-half of the total amount in dispute, is made up of the taxes of thirteen cities and towns and fifty-two school districts through which plaintiff's railroad line extends. The record shows this in detail. The complete autonomy and absolute independence of each of these political and municipal entities has been demonstrated. While by statute the county treasurer acts as the collector of taxes for all of them, he is *pro hac vice* the agent of each to collect its taxes, and not the agent of the county in respect to the collection of all of them, but only the agent of the county in respect to the collection of county taxes alone. Moreover, as we have already pointed out, he is required to account for and forthwith remit to each of his principals the taxes collected in its behalf.

How could we maintain a suit against the county for a tax collected, received, and retained by a town or a school district? How could we maintain a suit against one town or school district for a tax collected, received, and retained by another town or school district? How could we maintain a suit against the state at all; and, particularly, how could we maintain

a suit against the state to recover taxes collected, received, and retained by a county, or by any town or school district within that county? And how could we maintain a suit against a county, even for the county taxes which it through its treasurer had collected, received, and retained, when, under the statute of the State of Colorado, the right of action, if any, arises only upon refusal of the board of county commissioners to refund the same upon request, which must be followed by an appeal to the District Court of the state by the unsuccessful applicant, and when, by the statute of 1913 (Session Laws, Colo., 1913, p. 528, sec. 5), as we have already pointed out, the power of the county commissioners to allow any abatement, rebate, or refund of taxes in any case has been entirely taken away and the correlative duty of the county commissioners to make such refund in a proper case utterly destroyed? The duty, such as it was, no longer exists; therefore there can be no breach thereof. Where no duty or obligation exists, no cause of action can arise from failure or refusal to act. No suit can be successfully maintained by one who has no cause of action.

But if, by some miracle, we are able to maintain a suit at law against the county for the recovery of all of the disputed taxes, how could we enforce payment of the judgment? It is obvious that a general county tax, applicable to all of the property in the county, should not and could not be levied for the purpose of refunding illegal taxes, of which only a small part were county taxes and the major part consisted of taxes collected, received, and retained by

thirteen of the towns and fifty-two of the school districts in the county.

But where in the statute is it at all contemplated or provided that a judgment against the county, in a suit to which neither the towns nor the school districts were or could be parties, can be paid by a tax levy ordered by the county commissioners and applicable only in certain towns and certain school districts? What authority have the county commissioners to levy a tax in any town or school district, except in so far as a general county levy, applicable to all of the property in the county, applies *pro rata* to the property within such subdivisions? In truth, the county commissioners have and can have no such authority. Section 7 of Article X of the Colorado Constitution provides:

> "The general assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may by law vest *in the corporate authorities thereof respectively* the power to assess and collect taxes for all purposes of such corporations." (Italics ours.)

This constitutional provision not only plainly prohibits the General Assembly from itself attempting to levy any taxes for the purposes of any county, city, town, or school district, but likewise prohibits the General Assembly from attempting to confer authority so to do upon any subordinate agency, save only upon the corporate authorities of the particular subordinate municipal corporation or entity for whose purposes the tax is to be levied.

But the repayment by a county, a city, a town, or a school district of moneys illegally collected by such county, city, town, or school district, under the guise of taxation, and by it received and retained, is certainly, as to the refund which each makes, a county, city, town, or school district purpose, as the case may be. The statutes of Colorado enacted pursuant to the constitutional provision quoted above plainly authorize the corporate authorities of each of the subordinate municipal corporations mentioned above to levy taxes for their respective purposes, and likewise plainly prohibit the corporate authorities of any of them to levy taxes for the purposes of any of the others. The decisions in Colorado make this clear beyond question.

Taxation of Mining Claims, 9 Colo., 635, 636.

Boston & Colorado Smelting Co. vs. Elder, 20 Colo. App., 96, 99.

People ex rel. vs. Commissioners, 12 Colo., 89, 92, 93.

In the case last cited the court says (p. 92):

"The defendants by their answer claim that according to section 7, Article X of the Constitution of this state and other provisions of the Constitution and laws enacted in pursuance thereof, the power to levy taxes for school districts cannot be vested in the board of county commissioners, but that the authority to levy must be vested in the board of education of the proper district, or the school district itself. * * * We have

> considered with care the several constitutional and statutory provisions referred to in defendants' answer, and are of opinion that inasmuch as the board of education of the proper district is vested with the *sole power* of determining and certifying to the board of commissioners the number of mills per dollar necessary to be levied for school purposes, while by the same act the commissioners are deprived of all discretion in the matter of such levy, that it is the board of education, and not the county commissioners, who really levy or cause the taxes to be levied. * * * Notwithstanding the letter of the statutes, it is manifest that in the matter of levying the taxes the board of commissioners act in a mere ministerial capacity as the agents of the state, and the board of education of the proper district is vested *with the sole discretionary power in the premises.*" (Italics ours.)

We therefore submit, with confidence, not only that the statutes do not authorize the board of county commissioners to refund taxes erroneously collected, received, and retained by cities, towns, and school districts, but that, under the Constitution of Colorado, no statute would be valid which attempted to confer such authority upon the county commissioners.

It follows that, if plaintiff must now pay the disputed taxes and rely upon actions at law to recover the same, a separate action must be brought against each city, each town, and each school district men-

tioned in the list appearing at pages 43 and 44 of the printed record. Multiplicity of suits is inevitable. It also follows that every one of the sixty-five actions at law thus made necessary must be brought in the state courts, for in none of them would the amount involved be sufficient to authorize federal jurisdiction.

But a remedy available only in the state court is for this reason alone not an adequate remedy where the plaintiff, by reason of his citizenship, has the right to have the matter determined in the federal court.

Smyth vs. Ames, 169 U. S., 466, 516.

Arrowsmith vs. Gleason, 129 U. S., 86, 98.

Mayer vs. Fouldrod, Fed. Cas., No. 9341.

Bean vs. Smith, Fed. Cas., No. 1174.

Coler vs. Board, 89 Fed., 257.

United States Life Ins. Co. vs. Cable, 98 Fed., 761.

National Surety Co. vs. State Bank, 120 Fed., 593.

(d) *No such suit could be maintained unless payment had been under duress. Payment under protest would not avail.*

As noted, the Colorado statute makes no provision for payment under protest; indeed, it makes no provision whatever for suit to recover back. It has been expressly held in Colorado that payment of a tax before actual seizure and distraint of the property constitutes a voluntary payment, for which there can be no recovery back, even though the tax was illegally collected.

"The fact that the property was advertised for sale in no manner affects the proposition, nor would this be taken as a legal compulsion, preventing the application of the principle of voluntary payment. DeBaker vs. Cavillo, 52 Calif. 473; Bucknell vs. Story. 46 Calif. 495."

El Paso County vs. Colorado Springs Co., 15 Colo. App., 274, 280, 281.

Richardson vs. City of Denver, 17 Colo., 398.

In the last case cited the Colorado court cites and adopts the doctrine of the federal courts as expressed in—

Lamborn vs. County Commissioners, 97 U. S., 181.

Railroad vs. Commissioners, 98 U. S., 541.

See also:

Little vs. Bowers, 134 U. S., 547, 554.

These cases expressly hold that such a suit would fail unless the taxes were clearly paid under duress of distraint, seizure, and sale of plaintiff's property. If payment were made before such distraint, seizure, and sale, it would be voluntary and could never be recovered back, even though the taxes were found to be illegal. That payment was expressly made under protest would avail nothing.

In Colorado, taxes are to be paid in two instalments, on or before March 1 and August 1, respect-

ively. After August 1 they are collectible by distraint, but tax sales do not occur until late in the autumn. Therefore, in order to avail himself of the supposed remedy indicated by the court, the aggrieved taxpayer must wait until the late autumn and, when compelled so to do by the compulsion of sales or distraints, pay not only the amount of the original tax, but all of the enormous penalties, interest, and costs which would have since accrued.

In view of the nature of plaintiff's property and business, the cloud upon its title created by this tax, and the irreparable injury, both to the railroad and to the public, which would follow from any distraint, seizure, sale, or other interference with its property, plaintiff cannot, and in equity should not, be compelled to sit idly by and await such seizure. It is entitled to have its remedy in equity to prevent and forestall such seizure and sale.

> Union Pacific vs. Cheyenne, 113 U. S., 516, 525.
>
> Stanley vs. Supervisors, 121 U. S., 535, 550, 551.

The learned court below in its opinion upon the petition for rehearing (222 Fed., 653), says:

> "In the absence of a statute, the payment of a tax, with few exceptions, is held to be voluntary, and though the tax may be invalid, the money paid cannot be recovered. * * * The statute of Colorado here under consideration changes that law."

But, as we have already pointed out, the statute of Colorado does not, as those of other states do, provide that any such payment shall be considered as having been made under protest, or as not having been voluntary. And the Colorado cases hereinabove in this section cited plainly demonstrate that, notwithstanding the Colorado statute, such a payment would be voluntary, even though made under protest, and the amount paid not recoverable unless payment had been made under actual compulsion.

(e) *Even if, by some miracle, plaintiff succeeded in maintaining such a suit and in obtaining judgment, collection thereof could not be enforced.*

It must not be forgotten that the remedy at law which will oust the jurisdiction of equity must, both in respect of the final relief and the mode of obtaining it, be as efficient as the remedy in equity.

Kilborn vs. Sunderland, 130 U. S., 505.

If, by some miracle, we were able to maintain a suit against the county for the recovery after payment of all of the disputed tax, how could we enforce collection of the judgment? It is obvious that a general county tax, applicable to all the property in the county, should not and could not be levied for the purpose of refunding illegal taxes, of which only a part were general taxes and the major part consisted of taxes collected, received, and retained by thirteen of the towns and fifty-two of the school districts in the county. The inhabitants of the other portion of the county would not be responsible therefor, and their property could not legally be burdened with a tax

levied to pay the same. This the defendants recognize. For these reasons, and other reasons already pointed out, it would be wholly beyond the power of the board of county commissioners to raise the money necessary to satisfy the judgment.

But, passing this objection, how could plaintiff recover the money in case it eventually obtained judgment against this county? There is a provision of the statute for the issuance of judgment bonds by a county, with the proceeds of which judgments may be paid in case other funds are not available. But such bonds are to be voted by the people, and their issuance is dependent upon the will of the voters.

Rev. Stat. 1908, sec. 1380.

This statute, therefore, affords no relief.

Shapleigh vs. San Angelo, 167 U. S., 646, 657.

And another statute expressly provides that, when a judgment has been obtained against a county, no execution shall issue thereon, but the judgment may be paid by a special tax levied for that purpose, the levy to be ordered by the board of county commissioners in its discretion; "provided, further, that the powers herein given to the board of county commissioners shall not be construed as requiring said board to levy any special tax to pay any judgment unless in its discretion the said board shall so determine."

Rev. Stat. 1908, sec. 1183.

Stryker vs. Board of Commissioners (C. C. A. 8th Cir.), 77 Fed., 567.

From which it appears that no effective method has been provided for the collection of such a judgment, even after it has been obtained, and even in the case of the county. The situation is still more difficult as to the cities, towns, and school districts. Moreover, the expense of the long litigation requisite in any event to the obtaining of such a judgment, and the subsequent enforcement of its payment, could never be recovered back. Such remedies as these, if they exist at all, certainly are not so speedy, adequate, complete, and efficient as to preclude a resort to equity.

Bank of Kentucky vs. Stone, 88 Fed., 383, 390.

Pyle vs. Brenneman (C. C. A. 4th Cir.), 122 Fed., 787.

(f) *In any event, the money, if collected, either from the county, the cities, the towns, or the school districts, must necessarily and in large measure come from plaintiff's own treasury; for it must be raised by taxation of plaintiff's property.*

Plaintiff is the largest taxpayer in Weld County. For each of the years 1910, 1911, and 1912 the assessed valuation of its property in the County of Weld has been approximately 12 per cent of the total assessed valuation of all of the property in the county. This is approximately the ratio constantly maintained. In the school districts and other minor municipal entities this percentage is largely increased. In some instances the Railroad Company pays more than half of the total taxes. In other counties of the state the ratio is even greater than in Weld County.

If plaintiff should pay this disputed tax, subsequently sue to recover back, actually maintain the suit, and recover judgment, such a judgment, if paid at all, would have to be paid out of funds realized from a general tax levy, bearing equally upon all property within the limits of the authority levying the tax. (Colo. Constitution, Art. X, Sec. 3; Rev. Stat. 1908, p. 44.) Therefore, if the judgment were against the county, plaintiff would be obliged to contribute to the extent of approximately 12 per cent to the payment of its own judgment. If the judgment were against some of the school districts involved, plaintiff would be obliged to pay half, and in some instances practically all, of its own judgment. The same would be true when the county demanded reimbursement from the minor municipalities. How can it possibly be said that a remedy at law which merely affords to the plaintiff the privilege of taking his money out of one of his pockets and putting it into another, and which leaves his valid claim in fact unsatisfied, is as adequate or efficient as the remedy in equity?

In *Stuart vs. Union Pacific,* 178 Fed., 753, 757, Mr. Justice Van Devanter, then a Circuit Judge, said:

> "A remedy cannot be regarded as plain, complete and adequate, when to pursue it is to jeopardize a part of what is claimed, irrespective of the merits."

The situation of the Union Pacific in this regard in Weld County finds its parallel in every other county of the state through which its railroad runs, and in some the conditions in this respect are much

more aggravated and extreme. The same thing is true of every other railroad and large property-owner and taxpayer in every county of the state.

Much more might be said relative to the inefficiency and utter inadequacy of the remedy at law, even if it exists at all. What has been said surely should be sufficient to convince that that remedy is not *as* adequate, *as* efficient, *as* prompt, *as* certain, and *as* reliable as the remedy in equity which is here invoked. We therefore respectfully submit that, even though there had been a total absence of any of the recognized grounds of equity jurisdiction which by the terms of the Judiciary Act require the federal court of equity to entertain this suit, nevertheless such jurisdiction would have to attach, for the reasons hereinabove stated.

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3. *The statutory remedy, if any, is not and cannot be exclusive. The Supreme Court of the United States has repeatedly declared that no statute of a state can control, contract, condition, or in any manner limit the equity jurisdiction of federal courts, and that the remedy afforded by such a statute, no matter how adequate or complete, cannot oust the jurisdiction of a federal court of equity.*

After quoting a portion of the Colorado statute, the Circuit Court of Appeals says (217 Fed., 541):

> "Following the decision of the Supreme Court in Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481, the trial court held that this statute affords a complete *and exclusive*

remedy for the wrongs here complained of." (Italics ours.)

As to the assertion inferentially but necessarily involved in the foregoing quotation from this court's opinion—namely, that the Supreme Court in the Singer Sewing Machine case had held the statutory remedy to be exclusive—it is only necessary to quote from the Supreme Court's opinion, as follows (229 U. S., 486, 487):

> "We refer to these cases (Colorado cases dealing with the statute in question) not as defining the jurisdiction in equity of the Circuit Court, *for that they could not do.* (Payne vs. Hook, 7 Wall. 425, 430; Whitehead vs. Shattuck, 138 U. S. 146; Smythe vs. Ames, 169 U. S. 466, 516.) * * * Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, *unless there be special circumstances showing the contrary.*" (Citing cases.) (Italics ours.)

But the Circuit Court of Appeals, speaking of the statute in question, says (217 Fed., 544):

> "It was not intended to be cumulative. Its object was to give an action at law for the recovery of sums paid on account of invalid taxes, *in place of a suit in equity to restrain their collection.* Under such circumstances it does not lie with the courts to say that the remedy which the legislature has provided is inadequate, and that the remedy

which it has condemned shall, therefore, be continued. This would be to make the law of no effect through the traditions of equity. It would not only be judicial legislation, but would nullify a statute which is conceded to be constitutional. It is a mistake to view this statute as relating to procedure only. It creates a right in favor of the aggrieved taxpayer and, from considerations of the highest public policy, *abolishes the right to stay the collection of public revenues by injunction.* The courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the one which it takes away. The statute being constitutional, *the judgment of the legislature on that subject must control.*" (Italics ours.)

There is no uncertainty about this language. The court asserts with the utmost clearness that the statute amounts to a prohibition of the remedy by injunction, because it "abolishes the right to stay the collection of public revenues by injunction," and because against invalid taxes it provides a remedy, "in place of a suit in equity to restrain their collection." The court asserts with equal clearness that the statutory remedy is exclusive, and in all cases destroys jurisdiction in equity in the federal as well as in the state courts, precluding even an inquiry as to the adequacy of the remedy afforded by the statute. The court expressly holds that it does not "lie with the courts to say that the remedy which the legislature has provided is inadequate, and that the remedy which it has con-

demned should, therefore, be continued," and again expressly holds that to permit the federal court of equity to consider and pass upon the adequacy of the statutory remedy "would be to make the law of no effect through the traditions of equity," and that "it would not only be judicial legislation, but would nullify a statute which is conceded to be constitutional," and that "the courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the one which it takes away," and that "the judgment of the legislature on that subject must control."

We respectfully submit that this is new and startling doctrine. From the foundation of the federal judicial system until the court spoke in the present case, it had been held by an unruffled current of authority, including repeated decisions of the Supreme Court of the United States, that equity jurisdiction of the federal courts was to be determined in accordance with the general principles of equity as the same existed in 1789, at the time of the adoption of the first judiciary act; that if, in accordance with the guiding rules then recognized, a case fell within the scope of equity jurisdiction, no state statute, not even one which expressly prohibited resort to equity, and no remedy at law afforded or authorized by state statute or state decisions, however adequate and complete, could in any manner or to any extent whatever control, contract, condition, or limit the equity jurisdiction of the federal courts; and that, notwithstanding such state statute or state-given remedy, it was not only the privilege but the duty of the federal courts of equity to assume and retain jurisdiction and administer equitable relief in all cases justified

by "the traditions of equity" (to borrow the court's phrase), to the same extent and with the same freedom as though the state statute or the state-given remedy did not exist at all.

The court holds that the federal court of equity is precluded from considering the adequacy of the state-given remedy, because it may not review the judgment of the state legislature, and that it is ousted of its jurisdiction because the state statute exists. We respectfully submit that exactly the opposite is true. The federal court of equity need not and should not consider the adequacy of the state statutory remedy, because, however adequate and complete it may be, it cannot limit or affect federal equity jurisdiction; and the federal court of equity is not and could not be ousted of its jurisdiction by the state statute, because no state statute, whatever be its terms, can in any respect or to any degree limit, affect, or control such federal equity jurisdiction.

The court's opinion in the instant case, far from being supported by the decision of the Supreme Court in the Singer Sewing Machine case, is in direct conflict therewith. In that case the Supreme Court, after quoting a portion of the Colorado statute and referring to some of the Colorado cases in which it had been mentioned, said (229 U. S., 486):

> "We refer to these cases not as defining the jurisdiction in equity of the Circuit Court, *for that they could not do.* (Payne vs. Hook, 7 Wall. 425, 430; Whitehead vs. Shattuck, 138 U. S. 146; Smythe vs. Ames, 169 U. S. 466, 516.)" (Italics ours.)

In Payne vs. Hook, 7 Wall., 425, 430 (cited in the Singer case) the Supreme Court said:

> "We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states could not be impaired by the laws of states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial powers.' If legal remedies are sometimes modified to suit the changes in the laws of states and the practice of their courts, it is not so with equitable. *The equity jurisdiction conferred on the federal courts is the same that the High Court of Chancery in England possesses, is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union.*" (Citing many cases.) (Italics ours.)

In Smythe vs. Ames, 169 U. S., 466, 516 (cited in the Singer case), in response to the objection that the federal court of equity was without jurisdiction because a remedy at law had been provided by a state statute, the Supreme Court said:

> "We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court *is not to be conclusively determined by the statutes of the particular state in which suit may be*

brought. One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court. And he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. * * * But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship, or upon any other ground of federal jurisdiction. Payne vs. Hook, 7 Wall. 425, 430; McConihay vs. Wright, 121 U. S. 201, 205." (Italics ours.)

In McConihay vs. Wright, 121 U. S., 201, 205 (cited in Smythe vs. Ames, *supra*), objection was made to a bill to quiet title because by a statute of West Virginia an adequate remedy at law was provided in such case, in the form of an action in ejectment. This objection was overruled, the court saying:

"The contention of appellants, however, is that by the statute of West Virginia the complainant might have maintained an action of ejectment. Reference is made in support of this contention to the West Virginia Code of 1868, c. 90, to show that an action of ejectment in that state will lie against one claiming title to or interest in lands, although not in possession. Admitting this to be so, it nevertheless cannot have the effect

to oust the jurisdiction in equity of courts of the United States as previously established. That jurisdiction, as has often been decided, is vested, as a part of the judicial powers of the United States, in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. *Bills quia timet, such as the present, belong to the ancient jurisdiction in equity, and no change in state legislation giving, in like cases, a remedy by action at law, can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress.*" (Italics ours.)

In Mississippi Mills vs. Cohn, 150 U. S., 202, it appeared that the Circuit Court had denied jurisdiction in equity because by a statute of the State of Louisiana an adequate remedy at law had been afforded. The Supreme Court reversed this decision, citing and quoting from Payne vs. Hook, *supra*, and McConihay vs. Wright, *supra*, and holding, as stated in the syllabus:

"The jurisdiction of federal courts sitting as courts of equity cannot be enlarged or diminished by state legislation.

Whether such a court has jurisdiction in

> equity over a particular case will be determined by inquiring whether, by the principles of common law and equity, as distinguished and defined in this country and in the mother country at the time of the adoption of the Constitution of the United States, the relief sought in the bill was one obtainable in a court of law, or one which only a court of equity was fully competent to give."

In Borer vs. Chapman, 119 U. S., 587, 600, the court says:

> "It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests in administration suits, and in creditors' bills brought against executors or administrators, or after distribution against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to the payments of his debts. As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal courts, to be administered by the circuit courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, *and cannot be affected by any legislation except that of the United States.*" (Citing many cases.) (Italics ours.)

In Kirby vs. Lake Shore & Michigan Southern R. R., 120 U. S., 130, 137, the court says:

> "While the courts of the Union are required by the statutes creating them to accept as rules of decision, in trials at common law, the laws of the several states, except where the Constitution, laws, treaties and statutes of the United States otherwise provide, *their jurisdiction in equity cannot be impaired by the local statutes of the different states in which they sit.* In United States vs. Howland, 4 Wheat., 108, 115, Chief Justice Marshall, speaking for the court, said, that, as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction must be the same in all the states. The same view was expressed by Mr. Justice Curtis in his work on the jurisdiction of the courts in the United States (p. 13), when he observed that 'the equity practice of the courts of the United States is the same everywhere in the United States, and they administer the same system of equity rules and equity jurisdiction throughout the whole of the United States *without regard to state laws.*'" (Italics ours.)

In Ridings vs. Johnson, 128 U. S., 212, objection was made to jurisdiction in equity because an adequate remedy at law had been provided by a state statute of Louisiana. But the court said (p. 217):

> "We have distinctly held that the equitable jurisdiction and remedies conferred by the laws of the United States upon its courts cannot be limited or restrained by state legislation, and are uniform throughout the different states of the Union. Payne vs. Hook, 7 Wall., 425. We think, therefore, that the court erred in dismissing the bill for want of jurisdiction."

The doctrine announced in the foregoing decisions is not modern, occasional, or sporadic. It has been consistently adhered to since the establishment of the national courts, and constantly reiterated and insisted upon, not only in the cases cited above, but in numerous other decisions which might be added to the list.

In United States vs. Howland, 4 Wheat., 108, decided in 1819, objection had been made to a bill in equity because an adequate remedy at law was afforded by a statute of Massachusetts. But the court, speaking through Chief Justice Marshall, said (p. 114):

> "A trust exists, and an account would be proper to ascertain the sum due from Howland and Allen to Shoemaker and Travers. The case, even independent of these circumstances, would be proper for a court of chancery, but for the act of Massachusetts, which allows a creditor to sue the debtor of his debtor. Still, the remedy in chancery, where all parties may be brought before the court, is more complete and adequate, as the sum actually due may be there in such case ascertained with more certainty and facility;

and as the courts of the Union have a chancery jurisdiction in every state, and the judiciary act confers the same chancery powers on all, and gives the same rule of decision, its jurisdiction in Massachusetts must be the same as in other states." (Italics ours.)

And the rules enunciated in the foregoing authorities have been emphatically restated and applied in the most recent cases:

Waterman vs. Canal Louisiana Bank, 215 U. S., 33, 43.

McClellan vs. Carland, 217 U. S., 268, 281.

Guffey vs. Smith, 237 U. S., 101, 114.

In Guffey v. Smith, 237 U. S., 101, cited supra, the court, speaking through Mr. Justice Van Devanter, says (page 114):

"By the legislation of Congress and repeated decisions of this court it has long been settled that the remedies afforded and modes of proceeding pursued in the Federal courts, sitting as courts of equity, are not determined by local laws or rules of decision, but by general principles, rules and usages of equity having uniform operation in those courts wherever sitting. Rev. Stat., secs. 913, 917; Neves v. Scott, 13 How., 268, 272; Payne v. Hook, 7 Wall., 425, 430; Dodge v. Tulleys, 144 U. S., 451, 457; Mississippi Mills v. Cohn, 150 U. S., 202, 204. As was said in the first of these cases, 'Wherever a case in equity may arise and be determined,

> under the judicial power of the United States, the same principles of equity must be applied to it, and it is for the courts of the United States, and for this court in the last resort, to decide what those principles are, and to apply such of them, to each particular case, as they may find justly applicable.' "

Until the filing of the opinion in the case at bar, the Circuit Court of Appeals had constantly and consistently recognized the binding force of the foregoing authorities and steadily adhered to the rules which they announce.

In National Surety Co. vs. State Bank, 120 Fed., 593, objection was made to the jurisdiction in equity of the Circuit Court because by a statute of Nebraska an adequate remedy at law had been afforded. But the court, speaking through his Honor Judge Sanborn, said (p. 603):

> "Another reason why the proceeding provided by the Code of Nebraska does not oust the jurisdiction in equity of the national circuit court is that, while state legislation may enlarge, it cannot destroy or impair that jurisdiction. The power of circuit courts of the United States to administer rights and remedies in equity was vested in them as a part of the judicial power of the Nation, under the Constitution of the United States and the Judiciary Act of 1789; *and as it was not granted by, it may not be revoked, impaired or destroyed by, the act of any state. Unless changed by subsequent acts of Congress, the adequate remedy at law, which is the test*

> *of the equitable jurisdiction of the courts of the United States, is that which existed when that jurisdiction was vested—that which was when the act of 1789 was adopted.* McConihay vs. Wright, 121 U. S. 201, 206. As there were no adequate remedies at law for a wrong of the character of that of which the appellants complain in 1789, and as the Congress has since provided none, this case falls within the equitable jurisdiction of the circuit court, and must be there heard, determined and relieved." (Italics ours.)

In Butler Brothers Shoe Co. vs. United States Rubber Co., 156 Fed., 1, the court, speaking through his Honor Judge Sanborn, said (p. 18):

> "But the power of circuit courts of the United States to administer rights and remedies in equity was vested in them as part of the judicial power of the Nation, under the Constitution of the United States and the Judiciary Act of 1789, *and as it was not granted by, it may not be revoked, impaired or destroyed by, the legislation or act of any state.*" (Citing many cases.) (Italics ours.)

In this case certiorari was denied by the Supreme Court of the United States (212 U. S., 577).

In Dunlop vs. Mercer, 156 Fed., 545, 551, the court reiterated the doctrine, again speaking through his Honor Judge Sanborn.

In Spencer vs. Watkins, 169 Fed., 379, objection was made to the jurisdiction in equity of the Circuit

Court because by the Constitution and statutes of the State of Minnesota an adequate remedy at law was provided. But the court overruled the objection, holding that no state statute, however specific; no state-given remedy, however adequate, could oust the equity jurisdiction of the federal courts; and, speaking through his Honor Judge Hook, said (p. 381):

> "This must, of necessity, be so. Otherwise the judicial power of the United States, as understood at the adoption of the Constitution, would have no uniform or permanent measure, but would depend upon the varying legislative action of the several states, and as to that founded on diversity of citizenship, the tendency would be towards its extinction by absorption in the exclusive jurisdiction of the local tribunals. The equity jurisdiction conferred by the Constitution upon the courts of the United States is the same as that then possessed by the High Court of Chancery in England in its judicial capacity, as distinguished from the jurisdiction of a political or governmental character which was exercised by the Chancellor as the representative of the Crown. *It is uniform throughout the United States, not differing in one state from that in another, and is subject to neither limitation nor restraint by state legislation.*" (Italics ours.)

In this case certiorari was denied by the Supreme Court of the United States (215 U. S., 605).

In McClellan vs. Carland, 187 Fed., 915, the

court, following the direction of the Supreme Court of the United States in McClellan vs. Carland, 217 U. S., 268, 281, instructed Judge Carland, then United States district judge for the District of South Dakota, to entertain and proceed with the hearing upon a certain bill in equity. The Supreme Court had held that the bill was within the equity jurisdiction of the Circuit Court, notwithstanding certain statutory provisions of South Dakota which afforded a different remedy (217 U. S., 271). The Circuit Court of Appeals held likewise, and, speaking through his Honor Judge Sanborn, said (187 Fed., 918):

> "When the owner of property dies, his estate is immediately impressed with a trust for the benefit of his creditors, heirs and legatees. The High Court of Chancery in England had jurisdiction to enforce this trust. The national courts in equity as a part of their original jurisdiction derived from that court have plenary power at the suit of any proper heir, legatee or creditor, to enforce this trust against any occupant, executor, administrator or parties into whose control any part of the trust estate has come." (Citing many cases.) * * * (P. 919) "Moreover, this power of the federal courts to hear, to adjudge and to enforce their adjudications of the claims of alleged heirs, legatees and creditors, citizens of other states, to their shares of an estate under administration in a state court *may not be impaired or withdrawn by the probate or other laws of a*

state, since it was not derived from the states." (Citing many authorities.) * * *

"As the United States Circuit Court for the District of South Dakota had jurisdiction of the suit of the complainants below, it was its duty to proceed to try and decide it. The McClellans had the constitutional right to the speedy and independent opinion of the judge of the federal court upon the issues they presented, and the fact that the state was litigating, or was about to litigate, in its own courts the same issues constituted no sound reason why a national court should delay to adjudicate them. McClellan vs. Carland, 217 U. S. 278, 281." (Italics ours.)

But the court in the instant case (217 Fed., 546) says that section 723 of the Revised Statutes "means something," and that the present suit was "brought in violation of its provisions," because, as the court holds, a remedy at law had been afforded by the Colorado statute. It is quite true that section 723 does mean something. But what it means is nothing more nor less than what was always prior to its enactment meant by the settled rule of the High Court of Chancery in England relating to its jurisdiction.

In Boyce vs. Grundy, 3 Peters, 210, decided in 1830, the Supreme Court said (p. 215):

"This court has been often called upon to consider the Sixteenth Section of the Judiciary Act of 1789, and as often, either expressly or by the course of its decisions, has held that it is merely declaratory, *making no alteration whatever in the rules of equity*

on the subject of legal remedy." (Italics ours).

And in Wehrman vs. Conklin, 155 U. S., 314, the court, more than sixty years later, reiterated this statement, saying (p. 323):

> "Section 723 has never been regarded, however, as anything more than declaratory of the existing law, Boyce vs. Grundy, 3 Peters 210, and, as was said in New York Guaranty Co. vs. Memphis Water Co., 107 U. S. 205, 210, 'was intended to emphasize the rule and to impress it upon the attention of the courts.' *It was not intended to restrict the ancient jurisdiction of courts of equity, or to prohibit their exercise of a concurrent jurisdiction with courts of law, in cases where such concurrent jurisdiction had been previously upheld."* (Italics ours.)

And the adequate remedy at law mentioned in section 723 as ousting the jurisdiction of equity is one which existed in 1789, at the time of the creation of federal courts of equity, and not one which has since been afforded by a state statute. This is clearly held by the numerous authorities cited and quoted from, and is expressly stated by the Supreme Court in McConihay vs. Wright, 121 U. S., 201, 206, and by the Court of Appeals in National Surety Co. vs. State Bank, 120 Fed., 593, 603. See also:

Vol. 1, Street's Fed. Eq. Prac., p. 30, secs. 45 and 47.

Simkins Fed. Eq. Suit (2d ed.), pp. 11 and 15.

From the foregoing authorities we deduce the conclusion that if in a given case jurisdiction in equity be invoked, upon a ground which would have upheld such jurisdiction in the High Court of Chancery in England in the year 1789 and prior thereto, a federal court of equity now has jurisdiction thereof which is totally unaffected by any provision whatever of any state statute. Even a state statute expressly prohibiting jurisdiction in equity, and purporting to make the jurisdiction of the law courts exclusive, is unavailing. *A fortiori* is it true that a state statute which does no more than to afford a possible remedy at law, and by implication only, if at all, prohibits resort to equity, is wholly ineffective to limit, control, condition, or contract federal equity jurisdiction. That jurisdiction was not given, and cannot be taken away, or in any manner, directly or indirectly, limited, by the state. A state-given right or remedy at law which did not exist as a legal right or remedy in 1789, although in every respect adequate and complete, does not oust or affect the jurisdiction. Notwithstanding the existence of such a remedy, suitors who, by reason of diversity of citizenship or other statutory cause, may submit their controversies to the national courts, have an absolute right to have them determined on the equity side of those courts, if the grounds of equity jurisdiction presented are such as would have been recognized in the High Court of Chancery in 1789.

In the case at bar jurisdiction in equity was founded upon a number of well-sustained grounds, any one of which would have been sufficient to support that jurisdiction according to the state of the

law as it existed in 1789, and the principles and practices then recognized and applied by the High Court of Chancery and made a permanent part of the equity jurisprudence of all the federal courts in every part of the United States, which remains unchanged to the present day. But in the case at bar the Court of Appeals has held that this ancient and well-settled jurisdiction is ousted by a statute of the State of Colorado, which it is said affords a remedy at law, although that remedy did not exist in 1789, nor for nearly a century thereafter. In so ruling, the court ignored the numerous decisions hereinabove cited and quoted from, and many others, and violated the settled doctrine which they enunciate. The court, without discussion, citation, or mention, overruled its own repeated prior decisions cited above. We respectfully submit, and most earnestly urge, that in so doing the court committed manifest error and deprived petitioner of the right to have its controversy heard and determined in the federal court of equity—a right which is absolute and which is guaranteed by the Constitution and laws of the United States.

McClellan vs. Carland, 217 U. S., 268, 281.

Chicot County vs. Sherwood, 148 U. S., 529, 534.

McClellan vs. Carland, 187 Fed., 915, 919.

The foregoing rules are of general application. They apply to litigation involving alleged illegal and invalid taxes to the same extent and with the same force as to litigation of other kinds. If the Circuit Court of Appeals be right in the conclusions an-

nounced in its opinion, then the federal court sitting in Colorado has jurisdiction of a bill in equity to remove a cloud from title, and to enforce and administer other equitable rights and remedies, in all cases except where such cloud, or right or remedy, arises from, is created by, or is invoked as to illegal and invalid taxation; and in the latter case it has not such jurisdiction. If the court be right in its present conclusions, then the federal court sitting in Colorado has not jurisdiction to remove a cloud upon title or to afford other equitable relief where invalid taxes are involved, but in all other states where no statute exists, such as the Circuit Court of Appeals has construed the Colorado statute to be, the federal court of equity possesses such jurisdiction. This means that federal equity jurisdiction varies with the subject involved, is one thing in one state, and something different in another; that the power and jurisdiction of the federal court of equity change with the geographical location of the place of its sitting, and that state statutes shall be permitted to amend, repeal, and supersede the federal Constitution and acts of Congress. But this does violence to the rule announced by Chief Justice Marshall in 1819 (United States vs. Howland, 4 Wheat., 108, 114), repeatedly reiterated thereafter by the Supreme Court, and asserted time and again by the Circuit Court of Appeals for the Eighth Circuit itself: That federal equity jurisdiction "is uniform throughout the United States, not differing in one state from that of another, and is subject to neither limitation nor restraint by state legislation."

Spencer vs. Watkins, 169 Fed., 379, 381.

The principle has been repeatedly applied in litigation involving invalid taxes, and authorities involving such application will be cited in the section of this brief which immediately follows.

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4. *Both the Supreme Court and the Circuit Court of Appeals have repeatedly held that a federal court of equity will relieve against illegal and invalid taxes and enjoin the collection thereof, whenever equity jurisdiction is invoked upon a ground which, according to the rules and principles recognized and applied by the High Court of Chancery in 1789 would have supported such jurisdiction, notwithstanding the fact that by a state statute a most complete, comprehensive, and in every way adequate remedy at law may have been afforded.*

Immediately following that portion of the opinion quoted in the last preceding section of this brief, the court says (217 Fed., 544), referring to the statute of Colorado:

> **"Such statutes have been frequently before the Supreme Court, and have been uniformly held to afford a plain, speedy and adequate remedy, *such as excludes the right to resort to equity.* Tennessee vs. Sneed, 96 U. S. 69; Shelton vs. Platt, 139 U. S. 597; Indiana Manufacturing Co. vs. Koehne, 188 U. S. 681; Singer Sewing Machine Co. vs. Benedict, 229 U. S. 481." (Italics ours.)**

With the utmost respect, but with the greatest

earnestness, we urge that the foregoing statement in the opinion is not only unsupported by the authorities cited, and finds no sanction in any case which a most diligent search has revealed, but, on the contrary, is directly opposed to every decision of the Supreme Court, and of the Circuit Court of Appeals, including those cited in its support. The true rules are these:

1. If equity jurisdiction be invoked upon one of the ancient and recognized grounds, the federal court of equity must entertain the suit, no matter how adequate and complete a remedy may be afforded by the statutes of the state.

2. If in a given suit none of the ancient and recognized grounds of equity jurisdiction appear, nevertheless the federal court of equity must and will take jurisdiction if it is made to appear that under the statutes of the state no adequate means is provided for the recovery back after payment of moneys illegally exacted for taxes, because theoretically every wrong must have a remedy, and if such a remedy does not exist at law, it must be afforded by equity.

3. But, if in a given suit none of the ancient and recognized grounds of equity jurisdiction appear, and it also appears that by a statute of the state, or by the decisions of the state courts, money illegally exacted for taxation may be recovered back, and that the remedy thus provided is clearly adequate, then the federal court of equity will not assume jurisdiction.

The foregoing rules are but corollaries of the guiding principle clearly enunciated in the many cases cited in the preceding section of this brief. An

analysis of the decisions relating to matters of taxation demonstrates their correctness.

The cases cited by the court in the foregoing extract from its opinion arose in the States of Tennessee, Indiana, and Colorado, respectively. In the discussion which follows, these and other cases are classified with regard to the states in which they arose, so that the various provisions of the state statutes may be emphasized and clearly understood.

Tennessee.

By the statute of Tennessee express provision was made for the payment under protest of disputed taxes; for the retention of such money in a special fund until an action at law for its recovery could be brought and determined; for the prompt bringing of such action at law, and the prompt repayment of the money in case plaintiff succeeded; and the statute expressly made this remedy exclusive of all others, expressly prohibited resort to equity, and, in terms, forbade the issuance of any injunction or other writ to prevent, hinder, or delay the collection of any tax. (96 U. S., pp. 71, 72.) It will be seen that this statute is much more definite, comprehensive, and complete than that of Colorado, and certainly affords a plain, speedy, and adequate remedy at law.

In Tennessee vs. Sneed, 96 U. S., 69 (cited by the Circuit Court of Appeals), no question of federal equity jurisdiction was involved. The case reached the Supreme Court of the United States on writ of error to the Supreme Court of the State of Tennessee.

The relator had tendered in payment of the tax certain funds, including bills of the Bank of Tennessee, which he averred had been by a previous law of the state made legal tender and receivable in payment of taxes. This tender had been refused by the tax-collecting officer, and the relator, bringing his suit in the state court of said state, sought a writ of mandamus directing the collecting officer to receive said funds in payment. The state court denied the writ, which denial was affirmed by the Supreme Court of the state, and a writ of error sued out from the Supreme Court of the United States. Of course, no question was or could be involved as to the effect of the Tennessee statute, referred to above, upon the equity jurisdiction of the federal courts. Beyond doubt, such a statute controls the state courts. No question of federal power is in such a case presented, unless the state statute be in conflict with the federal Constitution, and such was the sole question presented to the Supreme Court in Tennessee vs. Sneed. The relator contended that the contract made by the provisions of the bank charter, to the effect that bills of the Bank of Tennessee should be receivable in payment of taxes, was impaired by the subsequent statute of Tennessee providing that the sole remedy should be by payment of the tax and suit to recover it back. The question presented is thus stated by the Supreme Court of the United States (96 U. S., 73):

> "It is said that the acts of 1873, to which reference is made, are laws impairing the obligation of the contract contained in the Twelfth Section of the Bank Charter. This is done, it is said, not by a direct infraction

> of the obligation, but by placing such impediments and obstructions in the way of its enforcement, by so impairing the remedies, as practically to render the obligation of no value. *This is the only point in the case involving a question of federal jurisprudence, and the only one that it is necessary for us to consider.*" (Italics ours.)

Thereupon the court proceeds to consider this one question, and arrives at the conclusion that the remedy afforded by the legislation of 1873 does not place such impediments and obstructions in the way of the enforcement of the alleged contract, or so impair the remedies thereon which existed at the time it was made, as to render the obligation of no value, and therefore that the obligation of the contract was not impaired in the sense of the federal Constitution. But this is very far from holding that the Tennessee statute "affords a plain, speedy and adequate remedy, such as excludes the right to resort to equity" in a case otherwise within the equity jurisdiction of the federal courts, as the Circuit Court of Appeals says it does.

Shelton vs. Platt, 139 U. S., 591, and Allen vs. Pullman's Palace Car Co., 139 U. S., 658 (both cited by the court), arose in the State of Tennessee, and were decided in 1891. They were suits in equity, brought on behalf of the United States Express Company and Pullman's Palace Car Company, respectively, to enjoin the collection of a tax alleged to be illegal. In neither case was there either allegation or proof of any ground of equitable jurisdiction upon which a like bill would have been entertained by the

High Court of Chancery, according to the principles and practices recognized and applied in 1789. On the contrary, the sole charge in either case was that the tax was illegal and void, because, as was alleged, the statute under which it was imposed was unconstitutional. There was no question of cloud on title, for no real estate was involved. There was no question of systematic under- or over-valuation, of repeated trespasses, of multiplicity of suits, of complicated issues and involved and difficult problems, involving procedure in the nature of accounting, or of any of the numerous grounds alleged and clearly shown to exist in the case at bar, upon which, according to the ancient and well-settled doctrine, equity jurisdiction may be invoked and should be exercised. Under these circumstances, in view of the statute of the State of Tennessee referred to above, the Supreme Court held that equity was without jurisdiction to enjoin the collection of the tax. But a reading of the opinions, particularly that in Shelton vs. Platt, makes it clear beyond peradventure of doubt that if any of the ancient and settled grounds of equity jurisdiction had existed, the ruling would have been otherwise. In the Shelton case the court concludes its opinion (139 U. S., 600) with these words:

> "And while an unconstitutional tax may, in the language of the learned judge holding the circuit court, confer no right, impose no duty, and support no obligation, it will be perceived that, in our view, the trespass resulting from proceedings to collect such void tax cannot be restrained by injunction, where irreparable injury *or*

other ground for equitable interposition is not shown to exist." (Italics ours.)

That this is what the court meant to hold is made clear by its subsequent opinion in Pacific Express Co. vs. Seibert, 142 U. S., 339, wherein, at page 348, Shelton vs. Platt, *supra,* and Allen vs. Pullman's Palace Car Co., *supra,* are reviewed; the court saying:

> "But, when the illegality of the tax, or the invalidity or unconstitutionality of the legislative act under which it is imposed, is established, it becomes necessary to go further and make out a case that can be brought under some recognized head of equity jurisdiction; such as, that the collection of the tax sought to be restrained may entail a multiplicity of suits; or cause some other irreparable injury, as, for instance, the ruin of complainant's business; or, where the property is real estate, throw a cloud upon the title of complainant. Shelton vs. Platt, 139 U. S. 591, 594; Allen vs. Pullman's Palace Car Co., 139 U. S. 658, 661."

But in Taylor vs. Louisville & Nashville R. R. Co. (C. C. A., 6th Cir.), 88 Fed., 350, decided in 1898, the question was expressly determined. That suit arose in Tennessee, and was a suit in equity in the federal court to enjoin the collection of a tax. Jurisdiction in equity was invoked upon the ground (p. 358) that the alleged illegal tax constituted a lien, and therefore a cloud upon the title to complainant's

real estate, which equity should remove. But the statute of the State of Tennessee, referred to above, was relied upon by the defendant as affording an adequate remedy at law and ousting the jurisdiction of equity. The court, consisting of Circuit Judges Taft and Lurton and District Judge Severens, overruled this contention, and, speaking through his Honor Judge Taft, said (p. 357):

> "The law of the United States forbidding injunctions in federal revenue cases prevents the issuing of an injunction by any court, whether federal or state, because the Constitution and laws of the United States passed in pursuance thereof are the supreme law of the land. The law of Tennessee, however, affects only the jurisdiction of its own courts of equity. It does not restrict or diminish the powers or jurisdiction of the federal courts of equity, because only an act of Congress can do that." (Citing authorities.) "Hence it follows that if the controversy at bar is one over which the circuit court of the United States, sitting in equity, from which this appeal has been taken, has jurisdiction by virtue of the Constitution and laws of the United States, and according to the general principles governing equity jurisdiction, its power to issue an injunction against state officers is not restricted by a state statute, which only applies, and can only apply, to injunctions issued out of the state courts. * * *"
>
> (P. 358) "Another ground for equitable

> relief is that the excessive tax, if not paid, will be a cloud upon the title of the complainant for the taxes assessed are a lien upon its property in Tennessee. The tax is not void, and the alleged illegal excess does not appear upon the record. It creates such an apparently valid incumbrance that a court of equity will interfere to remove it as a cloud, if, in fact, it is illegal. Ogden City vs. Armstrong, 168 U. S. 224, 238."

Certiorari to review the foregoing decision was denied by the Supreme Court of the United States (172 U. S., 647).

It was expressly approved in Johnson vs. Wells Fargo & Co., 239 U. S., 234, 244.

We therefore respectfully submit that, in spite of the complete and comprehensive provisions of the Tennessee statute, affording a remedy far more adequate and certain than that of Colorado, nevertheless the Supreme Court of the United States has distinctly and unequivocally held that such statute cannot avail to oust the equity jurisdiction of a federal court, if founded upon any of the recognized grounds of such jurisdiction, such as the removal or prevention of cloud upon title to real estate. It therefore plainly appears that Tennessee vs. Sneed, *supra;* Shelton vs. Platt, *supra,* and Allen vs. Pullman Co., *supra*, cited by the Circuit Court of Appeals, in no manner support the court's statement that such statutes have by the Supreme Court "been uniformly held to afford a plain, speedy and adequate remedy, such as excludes the right to resort to equity."

Indiana.

In Indiana Manufacturing Co. vs. Koehne, 188 U. S., 681, the state statute involved, as construed by the courts of Indiana, which is fully set forth in this court's opinion, beyond doubt afforded a plain, speedy, and adequate remedy at law. It was immeasurably more comprehensive, definite, and reliable than the Colorado statute here involved. In Indiana Manufacturing Co. vs. Koehne, *supra*, the taxes involved had been assessed upon the capital stock of the corporation, and therefore upon certain letters patent of the United States for inventions which the corporation owned. It was alleged that the tax was to this extent void and the statute authorizing it unconstitutional, because letters patent issued by the United States for inventions are not subject to state taxation. The company filed its bill in the federal court, seeking an injunction to restrain the collection of the tax. The court says (p. 684):

> "The foundation of this appeal to equity, as averred by complainant, was (1) on the ground that the assessment constitutes a cloud upon title; (2) that there is no adequate remedy at law; (3) that a multiplicity of suits is avoided, and (4) that it prevents irreparable injury to complainant. It has long been the settled doctrine of the federal courts that the mere illegality of a tax, or the mere fact that a law upon which a tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear

> that the party has no adequate remedy by the ordinary processes of the law, *or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc.*" (Italics ours.)

It will be observed that the disjunctive "or" is used, which is tantamount to an express holding that, even if an adequate remedy by the ordinary process of the law does exist, nevertheless the federal court of chancery will, and must, retain jurisdiction, if the case falls under some other recognized head of equity jurisdiction.

The court (p. 684) then takes up and discusses the four grounds of equity jurisdiction alleged in the bill, disposing of them seriatim. The contention that the tax constitutes a cloud upon title is rejected, because there is no statute making an assessment upon shares of stock a lien upon the real estate of a corporation, and, even if the tax were such a lien, there is no averment that the company owned any real estate, and hence there is no allegation of cloud upon title to real estate, which alone will support the jurisdiction of equity. But this is tantamount to the declaration that if a cloud upon title to real estate had been properly averred and supported by proof, jurisdiction in equity would have existed, notwithstanding the Indiana statute.

As to lack of adequate remedy at law (p. 685), which was claimed to exist because the State of Indiana could not be sued to recover back the tax after payment, the court calls attention to the statute of Indiana, and the construction placed thereon by the

Indiana decisions, from which it plainly appears that such a suit may be maintained.

As to multiplicity of suits (p. 689), the court called attention to the fact that under the statute of Indiana, as construed by its courts, only one suit was necessary.

As to irreparable injury (p. 690), the court holds that the allegation of irreparable injury is a mere legal conclusion, and that "there is no fact stated from which it could be inferred that irreparable injury would be likely to result from such enforcement, and where a plain and adequate remedy to recover the amount is given by statute, no such irreparable injury can be inferred. Some averment of specific facts must be made from which the court can see that irreparable injury would be a natural and probable result. Nothing of the sort is shown here." If it had been alleged and shown, as it is in the case at bar, clearly jurisdiction in equity would have been upheld, notwithstanding the Indiana statute.

The gist of the opinion is stated in this sentence, which appears near its close (p. 690):

> "But the right to resort to a federal court as a court of equity must be founded upon some ground of equitable jurisdiction recognized by the federal courts, and when, as here, no such ground appears, jurisdiction in equity cannot be maintained."

This is an express declaration that, notwithstanding the plain, speedy, and adequate remedy afforded by the definite and comprehensive provisions of the Indiana statute, federal equity jurisdiction would

have existed if any of the recognized grounds thereof, such as removal of cloud upon title, or the like, had been presented in Indiana Manufacturing Co. vs. Koehne, and it admits of no doubt that, in such case, the decision of the Supreme Court would have been in favor of the retention of such jurisdiction. How can it justly be said that such a case supports the assertion of the Circuit Court of Appeals to which it is cited? The Supreme Court itself has made the matter too clear for further discussion.

In the later case of Fargo vs. Hart, 193 U. S., 490, which also arose in Indiana, and was a suit to restrain the collection of taxes, the jurisdiction was founded upon one of the ancient and well-recognized grounds which would have been held sufficient in the High Court of Chancery in 1789. As a consequence, and notwithstanding the statute of Indiana authorizing the payment of the tax and suit to recover it back, jurisdiction in equity of the federal court was sustained, the court saying (p. 503):

> "We do not abate at all from the strictness of the rule that in general an injunction will not be granted against the collection of taxes. * * * But it was recognized in the passage just quoted from The Peoples National Bank vs. Marye (191 U. S., 272, 281), that under the present circumstances a resort to equity may be proper. The course adopted is the same that was taken, without criticism from the court, in Adams Express Co. vs. Ohio State Auditor, 165 U. S., 194. It avoids the necessity of suits against the officers of each of the counties of the state, and we are of opinion that the bill may be main-

tained. Union Pacific vs. Cheyenne, 113 U. S., 516; Pittsburgh, Cincinnati, Chicago & St. Louis Ry. vs. Board of Public Works, 172 U. S., 32."

We therefore respectfully submit that the decisions of the Supreme Court under the Indiana statute not only do not support the opinion of the Circuit Court of Appeals, but, on the contrary, are in direct conflict therewith.

Colorado.

The Colorado statute and the decision of the Supreme Court in Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481, have been separately dealt with in other portions of this brief. At this point it is sufficient to say that the Colorado statute is much less definite, certain, complete, and comprehensive than those of Tennessee and Indiana; that it has never been held, even by the state courts, to be exclusive, or to oust the equity jurisdiction of the state courts themselves when that jurisdiction is invoked on any of the known and recognized grounds; that the Circuit Court of Appeals has itself twice held that said statute does not and cannot oust, limit, or condition federal equity jurisdiction, if the same be properly invoked; and that the decision of the Supreme Court in the Singer Sewing Machine case not only does not sustain the statement in the lower court's opinion to support which it is cited, but, on the contrary, is in direct conflict therewith, and clearly recognizes the doctrine that, if federal equity jurisdiction be invoked upon any ground which would

have upheld such jurisdiction in 1789, the federal courts cannot renounce such jurisdiction, notwithstanding the fact that a state statute affords a most complete, comprehensive, and certain remedy at law, and notwithstanding the fact that a state statute expressly prohibits resort to equity.

We have now reviewed all of the authorities cited by the court in support of its statement that "such statutes have been frequently before the Supreme Court and have been uniformly held to afford a plain, speedy and adequate remedy *such as excludes the right to resort to equity.*" As before noted, these decisions were in cases arising in Tennessee, Indiana, and Colorado, and involved the statutes of those states. We respectfully submit that none of them support the conclusion of the Circuit Court of Appeals. On the contrary, all of them are in conflict therewith. But the same question has arisen in cases originating in other states having like statutes, and has been decided by the Supreme Court of the United States. A consideration of these decisions will further clarify the matter.

South Carolina.

This state has a statute authorizing payment under protest and suit to recover back taxes alleged to be illegal, and expressly prohibiting resort to equity. See S. C. Code 1912, secs. 460, 461. In In re Tyler, 149 U. S., 164, this statute and its effect upon the equity jurisdiction of the federal court were considered by the Supreme Court of the United States. The court (p. 188) said:

"It has been repeatedly and uniformly held by this court that in a proper case for equity interposition an injunction will lie to restrain the seizure of property in the collection of taxes imposed in contravention of the constitution of the United States. * * * It is said that any restraint upon or correction of unjust and illegal assessment and taxation by judicial interposition is inconsistent with the revenue laws of South Carolina, which only permit payment under protest and recovery back at law, and our attention is called to statutory provisions forbidding the courts to interfere with the collection of taxes by any writ, process or order, and to various decisions thereunder." * * * (P. 189) "Manifestly the object of this legislation was to confine the remedy of the taxpayer for illegal assessment and taxation, to the payment of taxes under protest, and bringing suit against the county treasurer for recovery back, *but all this is nothing to the purpose. The legislature of a state cannot determine the jurisdiction of the courts of the United States, and the action of such courts in according a remedy denied by the courts of a State does not involve a question of power.*" (Italics ours.)

And in spite of such statute the Federal Courts have constantly entertained equity jurisdiction and administered equitable relief in cases of this character arising in South Carolina. Humphrey vs. Pegues,

16 Wall., 244; Gunter vs. Atlantic Coast Line, 200 U. S., 273, 278, 286, 292.

Virginia.

By a statute of Virginia authorizing a certain bond issue, the coupons from said bonds were expressly made receivable in payment of taxes. By a later statute, the tax collectors were forbidden to receive these coupons in payment of taxes, and couponholders were required to pay the taxes in cash, at the same time making tender of the coupons, and thereafter sue at law to recover back the money so paid. This remedy was by the statute made exclusive of any and all other remedies, and resort to equity thereby prohibited. (See 114 U. S., 270, 275, 298, 302.) The matter came before the Supreme Court in the famous Virginia Coupon Cases.

Poindexter vs. Greenhow, 114 U. S., 270.
Allen vs. Baltimore & Ohio, 114 U. S., 311.

The case first cited was on writ of error to reverse a judgment in an action at law in a state court of Virginia. The second case above cited was on appeal from the United States Circuit Court for Virginia, wherein a bill in equity had been filed and an injunction sought and obtained to restrain the collection of the tax. By considering the two cases together, we obtain a very clear view of the different effect of the statute of a state upon remedies in its own courts and upon equity jurisdiction and equitable relief in the United States courts. The case first

cited was an action of detinue to recover certain property which had been seized by the tax collector after the plaintiff had tendered said coupons in payment of the tax. The legislation of Virginia was reviewed solely upon the question as to whether the subsequent legislation impaired the obligation of the contract embodied in the bonds and coupons and the act under which they were issued. Even in the law case the Supreme Court expressly stated (114 U. S., 295) that jurisdiction in equity would have been entertained and relief administered. And this although (p. 298) the statute of Virginia had substituted a remedy by payment and action to recover back, which remedy "thus substituted and declared exclusive is one that requires the taxpayer demanding to have coupons received in payment of taxes, first, to pay the taxes due from him in money, under protest, when, within thirty days thereafter, he may sue the officer to recover back the amount paid, which, on obtaining judgment therefor, shall be refunded by the auditor of public accounts out of the treasury;" and although (p. 302) "we shall assume, however, for the purposes of this opinion, that these acts of the general assembly of Virginia were intended to and do forbid every action, of whatever kind, against the collecting officer, for the recovery of specific property taken by distraint, or of damages for its caption or detention, and leaves to the coupon-holder, as his sole right of action, the suit to recover back the money illegally collected from him."

But, notwithstanding these express provisions of the Virginia statute clearly prohibiting resort to equity, and plainly providing a certain, speedy, and adequate remedy at law, the Supreme Court in the

equity case, which had been brought to enjoin the collection of such taxes (114 U. S., 311, 317), definitely held that the federal court of equity had jurisdiction to entertain the bill and grant the relief sought, and affirmed the action of the Circuit Court, which had issued the injunction.

It would be difficult to imagine a case more clearly illustrating or more conclusively establishing the doctrine for which we here contend.

Wyoming.

The statute of Wyoming, originally enacted in 1876 and appearing in the Revised Statutes of Wyoming, 1887, as section 3821, provided as follows:

> "In all cases where any person shall pay any tax or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to clerical errors or other errors, the board of county commissioners shall direct the treasurer to refund the same to the taxpayer."

The remarkable similarity between this statute and the Colorado statute here involved is at once apparent. While the foregoing statute was in effect, the Union Pacific Railway Company filed its bill in the territorial court of Wyoming to restrain the collection of a certain tax.

> Union Pacific Ry. Co. vs. Cheyenne, 113 U. S., 516.

Territorial courts are, of course, federal courts,

and it admits of no doubt that their equity powers and jurisdiction are conferred by the Constitution and laws of the United States.

In the bill of the railway company equity jurisdiction was invoked upon the ground that the tax constituted a lien, and therefore a cloud, upon the title to real estate. The bill was demurred to, on the ground that "complainant should have sought a remedy at law and not in equity." The territorial court overruled the demurrer, sustained the bill, and granted the injunction. The Supreme Court of the territory reversed this determination, and ordered the bill dismissed. The Supreme Court of the United States reversed the Supreme Court of the territory, and remanded the case, with directions to issue a permanent injunction. Notwithstanding the statute of Wyoming, referred to above, the Supreme Court held that the necessity of removing or preventing cloud upon the title to real estate required the interposition of equity, saying (p. 525):

> "Even the cloud cast upon his title by a tax under which such a sale could be made would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot of themselves furnish any ground for equitable interposition. In ordinary cases a

party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of *cloud upon the title* to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these in proper cases may be afforded in courts of equity.' This statement is in general acordance with the decisions of this court, as well as of many state courts." (Citing many cases.)

California.

The California statutes contain complete and comprehensive provisions for the payment under protest of any and all taxes claimed to be illegal or erroneous, and the prompt recovery of the same in an action at law. (Political Code of California, secs. 3804, 3819.)

Section 3819 of the Code, which expressly provides for recovery back after payment, is quoted in 197 U. S., pages 109, 110. Section 3804 of the Code is as follows:

> "Any taxes, percentum and costs erroneously or illegally collected may by order of the Board of Supervisors be refunded by the county treasurer."

The statutory provisions are much more complete, definite, and certain than those of Colorado, and

the remedy afforded is beyond question plain, speedy, and adequate. Nevertheless, and notwithstanding said statutory provisions, the Supreme Court of the United States has definitely and distinctly held that the Circuit Court of the United States has jurisdiction of a bill to enjoin the collection of a tax imposed under the laws of California, and that it is its duty to entertain such a bill and grant the relief sought.

San Francisco National Bank vs. Dodge, 197 U. S., 70, 75, 110, 111.

The Supreme Court reversed both the Circuit Court and the Circuit Court of Appeals, saying (p. 75):

> "The appellant bank sued to restrain the enforcement of state, county and city taxes levied for the year 1900 upon shares of stock of the bank. Adequate averments were made to show equitable jurisdiction. Cummings v. Merchants National Bank, 101 U. S. 153, 157; Hills v. National Albany Exchange Bank, 105 U. S. 319; Lander v. Mercantile National Bank, 186 U. S. 458."

That this precise question was fully considered is evident from the vigorous dissenting opinion (pp. 110-111).

Ohio.

The statute of Ohio expressly provides for the payment under protest of a disputed tax, and its recovery back in an action at law. (101 U. S., 156.)

Notwithstanding this statute, the Supreme Court of the United States has repeatedly held that a bill to restrain the collection of a tax imposed under the laws of Ohio is within the jurisdiction of a federal court of equity, whenever such jurisdiction is invoked upon any of the grounds which were recognized as sufficient in 1789.

Pelton vs. National Bank, 101 U. S., 143.

Cummings vs. National Bank, 101 U. S., 153.

Sanford vs. Poe, 69 Fed., 546.

Adams Ex. Co. vs. Ohio, 165 U. S., 194.

In Ohio Tax Cases, 232 U. S., 576, which arose in recent years and while said statute or a similar one was still in effect, jurisdiction in equity was nevertheless upheld, the Supreme Court saying (page 587):

> "The right to invoke the equity jurisdiction is clear, for the act specifically makes the tax a lien upon the real estate of appellants, from the cloud of which they sought to free it by the bringing of these actions (sec. 117 of the act; sec. 5506, General Code), and the bills alleged threatened irreparable injury through the enforcement of the penalties and coercive features of the act. Shelton vs. Platt, 139 U. S. 591, 598; Ex Parte Young, 209 U. S. 123."

It is true that the statute of Ohio also expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments, or the collection of

them. (101 U. S., 157.) And the Circuit Court of Appeals says (217 Fed., 545) that the decision in "Cummings v. National Bank rests upon that statute." That this is not so is evident from the Cummings opinion itself, for the court says (101 U. S., 157):

> "The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases.
>
> *Independently of this statute*, however, we are of opinion that when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the constitution, and when this rule is applied, not solely to one individual, but to a large class of individuals or corporations, that equity may properly interfere to restrain the operation of this unconstitutional exercise of power. That is precisely the case made by this bill, and if supported by the testimony relief ought to be given." (Italics ours.)

See also:

> Norwood vs. Baker, 172 U. S., 269, 291, 292.

From which it plainly appears that, notwithstanding the statute of Ohio authorizing recovery back in an action at law, and even in the absence of a statute providing for an injunction, jurisdiction in

equity would nevertheless have been retained, because that jurisdiction was founded upon a ground recognized as sufficient at the time of the adoption of the Judiciary Act, and incorporated therein as a permanent part of the equity jurisdiction of federal courts. As has been repeatedly held, the equity jurisdiction of federal courts cannot be affected, limited, or taken away by the statute of a state. It admits of no doubt that in the case of Cummings vs. National Bank equity jurisdiction would have been upheld in the absence of the Ohio statute authorizing an injunction. It is likewise beyond question that even in the absence of said provision of the state statute such jurisdiction would nevertheless have been upheld, notwithstanding the concurrent provision of the state statute authorizing payment of the disputed tax and its recovery back in an action at law; for the court says (101 U. S., 157):

> "And though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in federal courts, nor deprive them of their separate equity jurisdiction, we have also held that where a statute of a state created a new right or provided a new remedy, the federal courts will enforce that right, either on the common law or equity side of its docket, as the nature of the new right or the new remedy requires."

But the equity jurisdiction of the federal courts cannot be enlarged, any more than it can be restricted, by state statutes. True it is that where a

state statute grants a new right, such right will be enforced on the equity side of the federal courts, if such right and its enforcement in that way are entirely consistent with the rules and principles of federal equity jurisprudence, and within its jurisdiction as defined by the federal Constitution and statutes. Not otherwise.

Whitehead vs. Shattuck, 138 U. S., 147.
Scott vs. Neely, 140 U. S., 106.

It follows that, notwithstanding the statute of Ohio authorizing injunctions, a suit for such an injunction could not be maintained in a federal court of equity unless founded upon some recognized ground of equity jurisdiction, as well as upon the Ohio statute. It follows also that, if the Circuit Court of Appeals is right in holding that a state statute affording a remedy at law by suit to recover back a tax precludes resort to a federal court of equity, notwithstanding the existence of well-settled and anciently recognized grounds which would otherwise support equity jurisdiction, then the Supreme Court in the case of Cummings vs. National Bank was wrong in upholding the jurisdiction of equity, because Ohio had a statute authorizing the payment and recovery back of the disputed tax. The obvious conclusion is that the Supreme Court in the Cummings case upheld jurisdiction in equity because it was founded upon an ancient and well-settled ground, and could neither be diminished nor enlarged by any state statute, whatever its provisions, and did not uphold said jurisdiction because of the statute of Ohio authorizing injunctions. The latter it could not do in the absence

of some other ground of equity jurisdiction recognized in federal courts.

Illinois Life Ins. Co. vs. Newman, 114 Fed., 449.

The Supreme Court has so held in an Ohio case:

Scottish Union vs. Bowland, 196 U. S., 611, 633.

West Virginia.

The statutes of this state prohibit resort to equity and the issue of an injunction to restrain the collection of taxes. We understand that they also provide for the refunding of invalid or illegal taxes after their collection.

In Pittsburg etc. Ry. Co. vs. Board of Public Works, 172 U. S., 32, a bill in equity was filed in the United States Circuit Court for an injunction to restrain the collection of taxes alleged to be illegal and invalid. The statute of West Virginia was relied upon as limiting the equity jurisdiction of the federal court. The Supreme Court said (p. 46):

> "The statute also contains a provision that 'no injunction shall be awarded by any court or judge to restrain the collection of the taxes or any part of them so assessed, except upon the ground that the assessment thereof was in violation of the constitution of the United States or of this state, or that the same were fraudulently assessed, or that there was a mistake made by the auditor in the amount of taxes properly chargeable on

> the property of said corporation or company, and in the latter case no such injunction shall be awarded unless application be first made to the auditor to correct the mistake claimed, and the auditor shall refuse to do so, which facts shall be stated in the bill.' *While this provision cannot, of course, bind the courts of the United States,* it is nearly in accord with the rule governing the exercise of the jurisdiction in equity of those courts, as established by the decisions cited at the beginning of this opinion."

And the Supreme Court held that jurisdiction in equity was not properly invoked, because there was no showing of "special circumstances bringing the case within some recognized head of equity jurisdiction." If such showing had been made, beyond question jurisdiction would have been entertained, notwithstanding the West Virginia statute.

Oklahoma.

In Western Union Telegraph Co. vs. Trapp, 186 Fed., 114, the Circuit Court of Appeals had under consideration a suit in equity wherein the bill had been filed in the Circuit Court of the United States for Oklahoma, seeking an injunction against the collection of certain taxes imposed under the laws of that state. It was objected to the jurisdiction in equity of the federal court that complainant had an adequate remedy at law under the Constitution and statutes of Oklahoma, but this court said (186 Fed., 121):

> "The rule is that statutory remedies at law furnished by a state in its courts will not oust the equitable jurisdiction of a federal court of equity." (Citing many authorities.)

And in Ritterbusch vs. Atchison, Topeka & Santa Fe, 198 Fed., 46, also a suit in equity in the United States Circuit Court for Oklahoma, wherein injunctive relief was sought against a tax claimed to be invalid, the court of appeals as well as the lower court, entertained the bill and administered the relief sought, notwithstanding the existence of the state-given remedy at law.

South Dakota.

In Wells, Fargo & Co. vs. Johnson, 214 Fed., 180, decided April 24, 1914, the court was considering a bill in equity filed in the District Court of the United States for South Dakota, wherein injunctive relief was sought against taxes claimed to be illegal and invalid. The lower court had dismissed the bill. The Court of Appeals reversed the decree. Objection was made to the jurisdiction in equity, because by the laws of South Dakota an adequate remedy at law existed, consisting of payment and subsequent recovery back in an action at law of the amount of the invalid tax. Upon that subject, the court, speaking through his Honor, Judge Sanborn, said (p. 188):

> "Finally, counsel for the defendant argue, as we understand their brief, that although the law under which the assessments were made is unconstitutional and the as-

> sessments and taxes are void, still the plaintiffs are entitled to no injunction against their collection * * *" (P. 189) "(4) Because the plaintiffs have an adequate remedy at law; but the plaintiffs now have, and are entitled, as against these unconstitutional taxes, to the right to keep the amount required to pay them. The rights of the parties have been litigated and determined. The only remedy at law the plaintiffs have is either to defend against a proceeding to collect the taxes on the same grounds which have been presented and sustained in these suits, or to pay the amounts of these taxes under protest and bring actions at law to recover them back. Neither of these remedies is as prompt, as certain or as complete as the immediate decree of this court and its injunction, to which the plaintiffs have established their right in this litigation."

In Johnson vs. Wells Fargo & Co., 239 U. S., 234, the foregoing decision was recently in all respects affirmed by the Supreme Court of the United States, the court saying (p. 243):

> "The contention is made that there was no ground for equity jurisdiction, and that therefore the bill should have been dismissed. This court has frequently held that a bill will not lie in the Federal courts to enjoin the collection of state taxes where a plain, adequate and complete remedy at law has been given to recover back illegal taxes *and the attack upon the assessment is based*

upon the sole ground that the same is illegal and void. See Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481, where many of the previous cases in this court are reviewed. But in the present case it was alleged not only that the assessment was unwarranted by the law, *but that the manner of making the assessment amounted to fraud upon the constitutional rights of the express companies or such gross mistake as would amount to fraud, thus averring a distinct and well-recognized ground of equity jurisdiction.* It also appears that the tax of 1909 had been enjoined similarly, and that from the decree in that case no appeal had been taken. *Such continuing violation of constitutional rights might afford a ground for equitable relief.* See Cummings vs. National Bank, 101 U. S. 153, 157, 158; Stanley vs. Supervisors, 121 U. S. 535, 550; Fargo vs. Hart, 193 U. S. 490, 503; Taylor vs. Louisville & Nashville R. R., 88 Fed. Rep., 350." (Italics ours.)

A like decision in a South Dakota case had previously been made, both by the Supreme Court and by the Circuit Court of Appeals.

United States vs. Rickert, 106 Fed., 1.

United States vs. Rickert, 188 U. S., 432, 444.

United States vs. Rickert, 123 Fed., 1007.

Montana.

The statutes of Montana contain complete, comprehensive and specific provisions for the payment under protest of disputed taxes and their recovery back in an action at law. Section 2669 of the Revised Code provides:

> "Any taxes, percentum and costs erroneously or illegally collected may by the order of the board of county commissioners be refunded by the treasurer."

Sections 2742 and 2743 provide for payment under protest and subsequent suit to recover back, and that in the event of such payment under protest and suit the county treasurer shall hold and not distribute the moneys so collected until the determination of the litigation.

Section 2744 requires the judgment obtained in such litigation to be paid in preference to all other claims on the treasury, and section 2745 provides that the statutory remedy shall be exclusive, and shall supersede injunctive relief and all other remedies.

In Brown vs. French, 80 Fed., 166, the court was considering a bill in equity brought to enjoin the collection of an illegal tax, the jurisdiction in equity being founded upon the assertion that the illegal tax itself, or a sale made thereunder, would constitute a cloud upon the title to complainant's real estate. It was objected that equity was without jurisdiction, because an adequate remedy at law existed, consisting in the payment of the tax and suit to recover it back. But the court said (p. 168):

"The next question presented is as to whether the court has any right to enjoin the collection of this tax. It is claimed on behalf of the defendant that the receiver, Brown, should pay this tax under protest, and then recover the same back from the tax collector in an action at law. The tax in this case was made by law a lien upon the real estate of the bank, although not a tax on such real estate. The tax collector was proceeding, under the provision of the state law, to sell the real estate described, and had advertised the same for sale. Such a sale as this would have created a cloud upon the title of the bank to the real estate sought to be sold. The deed given in pursuance of such a sale would be prima facie evidence that (1) the property was lawfully assessed as required by law; (2) the property was equalized as required by law; (3) the taxes were levied in accordance with law. Pol. Code. Mont. sec. 3897. In the case of Huntington v. Railroad Co., 2 Sawy. 503, 514, Fed. Cas. No. 6,911, Judge Sawyer held that a deed in such a case would cast a cloud upon the title to the land named therein, and said:

'In such case the court will interfere by injunction to prevent a cloud being cast upon the title. The court will enjoin the casting of a cloud upon the title in cases wherein the cloud itself, when cast, would be removed.' Pom. Eq. Jur. sec. 1345.

In the case of Railway Co. v. Cheyenne,

113 U. S. 516, 525, 5 Sup. Ct. 601, 605, Justice Bradley, speaking for the court, said:

'Even the cloud cast upon his title by a tax under which such a sale would be made would be a grievance which would entitle him to go into a court of equity for relief.'

In the following cases it is recognized that a court of equity will interfere to restrain the collection of an illegal tax when some established ground for equitable interference is presented: Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646; Dows v. City of Chicago, 11 Wall. 109; Hannewinkle v. Georgetown, 15 Wall. 547; Lyon v. Alley, 130 U. S. 177, 9 Sup. Ct. 480. Cooley Tax'n, 422-444. If the preventing or removing a cloud upon a title is a recognized ground of equity jurisdiction, a law of a state which affords a legal remedy for the wrong complained of will not divest the court of equity of its jurisdiction in a proper case. In the case of Barber v. Barber, 21 How. 582, 592, the supreme court said:

'It is no objection to equity jurisdiction in the courts of the United States that there is a remedy under the local laws; for the equity jurisdiction of the federal courts is the same in all the states, and is not affected by the existence or non-existence of an equity jurisdiction in the state tribunal.' See, also: Kirby vs. Railroad Co., 120 U. S., 130, 137; 7 Sup. Ct., 430."

Many other decisions of the Supreme Court and other federal courts to the same effect might be cited. But it is certainly unnecessary to go further with the analysis of various state statutes and the citation of federal decisions relating thereto. We respectfully submit that those to which attention has now been directed more than suffice to demonstrate that state statutes and state-given remedies relating to matters of taxation are in no wise excepted from the operation of the general rule. In respect to those, as in respect to all other state statutes and state-given remedies, the unvarying and invariable rule, from which the Supreme Court has never departed, is that, no matter how plain, certain, speedy, adequate, comprehensive, and complete may be the remedy at law which state statutes or state decisions have afforded, and even though the state statute expressly prohibits resort to equity or the issue of an injunction in such cases, nevertheless the federal court of equity will and must entertain jurisdiction and administer equitable and injunctive relief in every case where such jurisdiction is invoked upon a ground which would have been recognized and effective in the High Court of Chancery in England in 1789, because the settled doctrines and practices of that court respecting its equity jurisdiction and jurisprudence were by the Constitution and laws of the United States made a permanent part of the structure of the federal judicial system, and thus placed entirely beyond the reach of any state power whatsoever. Unless, therefore, the statute of the State of Colorado possesses some peculiar attribute which makes it more potent than those of other states, or unless the Supreme Court in Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481, has overruled

the hitherto unbroken line of its decisions to which we have adverted, and annihilated the fundamental principle enunciated by those decisions, which from the foundation of the government had steadily been adhered to, then we respectfully submit that the Court of Appeals committed an obvious and unmistakable error in the ruling of which we now complain. To the inquiry suggested in the foregoing sentence we now address ourselves.

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5. *The Colorado statute is not more potent than those of other states. Even in the state courts of Colorado the statute is held not to be exclusive, nor to oust equity jurisdiction, when invoked on such grounds as are here presented.*

Previous decisions of the Circuit Court of Appeals, relating to the Colorado statute, are to the same effect.

Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481, is not in conflict, but in consonance, with the settled doctrine hereinbefore discussed, and not only does not support, but is directly opposed to, the decision in the present case.

It is unnecessary at this point closely to analyze the Colorado statute. This we do elsewhere in this brief. It is sufficient to say here that the Colorado statute does not, in terms, prohibit resort to equity, and, as construed by the highest courts of that state, it does not do so by implication, or at all. It is also sufficient to say here that, in so far as the Colorado statute affords any remedy (if it does) in respect to the recovery at law of money paid on account of

invalid taxes, that remedy is incomparably less certain, plain, speedy, adequate, and comprehensive than the analogous remedies provided by the statutes of other states, which have been reviewed in the foregoing pages. In the present opinion the court says (217 Fed., 543):

> "The evil caused by suits in equity to restrain the collection of taxes is grave, and has often been set forth by courts. * * * To correct this evil, statutes of similar import to Section 5750 have been passed in many of the states of the Union. The highest court of Colorado has frequently declared the correction of this evil to have been the object of its statute. Board of Commissioners of Bent County vs. Atchison, T. & S. F. Ry. Co., 52 Colo. 609, 125 Pac. 528. * * *" (P. 7) "It (the Colorado statute) has existed for more than forty years. It has been repeatedly held by the highest court of the state to afford the taxpayer a plain, speedy and adequate remedy."

It will be observed that the court cites but one Colorado case. From this it draws the conclusion stated above, and the further conclusion that the statute, as interpreted by the Colorado courts, is exclusive, ousts the jurisdiction of equity, even in such a case as the one at bar, and is so potent as to prevent any inquiry or investigation by a court of equity as to whether the remedy which it affords is plain, speedy, and adequate. In this the court is clearly wrong. The guiding rule in the courts of Colorado, steadily ad-

hered to through a long course of decisions, is that, notwithstanding this statute and the one which preceded it, a court of equity has jurisdiction, and must and will afford equitable and injunctive relief against invalid taxation, whenever equity jurisdiction is invoked upon any of the well-settled grounds, such as removal or preventing of cloud upon title, avoidance of multiplicity of suits, systematic, repeated, or intentional over- or under-assessment, the application of an illegal or unconstitutional principle of assessment, and other like grounds, which appear in the case at bar. It admits of no doubt that, if this suit had been brought in a state court of Colorado, on the equity side thereof, jurisdiction in equity would have been retained.

(a) *The Colorado Decisions.*

In Colorado F. & L. S. Co. vs. Beerbohm, 43 Colo., 464; 96 Pac., 446, decided in 1908, the suit had been filed in equity to cancel a tax, alleged to be illegal, and to restrain its collection. Jurisdiction in equity was expressly invoked for the purpose of removing the cloud upon title created by the invalid tax, and the further cloud which would be created by a sale of the real estate for said taxes and the subsequent issue of a deed. It was alleged that the land was exempt from taxation. But this was the cause of the invalidity of the tax, and, as the Circuit Court of Appeals says in the present opinion (217 Fed., 544), "we are not concerned with the cause of invalidity of the tax. It may be due to illegality, unconstitutionality or fraud. Whatever the cause, it can do no more than make the tax invalid, and that alone is not a ground of equitable

jurisdiction." In the Beerbohm case the trial court sustained a demurrer to the complaint, which demurrer was expressly based upon the ground that the case was not within the jurisdiction of equity (p. 470). This point received specific consideration in the Supreme Court (pp. 479 et seq.), and, notwithstanding the Colorado statute, the Supreme Court held that the case was within the jurisdiction of equity, and that equitable and injunctive relief should be afforded, founding its decision (p. 481) on Fargo vs. Hart, 193 U. S., 490, hereinbefore cited and relied upon by us, and concluded the opinion as follows (p. 482):

> "Our conclusion is that the plaintiff's complaint alleged facts sufficient to entitle it to the injunctive and other relief sought, and that the court erred in sustaining the demurrer thereto, and in striking from the files the supplemental complaint, and in rendering the judgment complained of."

In Gale vs. Beerbohm, 43 Colo., 521; 96 Pac., 449, decided in 1908, the same ruling was made, upon a similar record, and under like circumstances.

In Gale vs. Statler, 47 Colo., 72; 105 Pac., 858, decided in 1909, the trial court had sustained a demurrer to, and dismissed, a bill in equity which sought an injunction against the collection of a tax, and its cancellation. An examination of the record discloses that jurisdiction in equity was expressly invoked to prevent and remove a cloud upon the title to plaintiff's real estate. The question of jurisdiction in equity was specifically raised and discussed in the briefs filed in the Supreme Court, the court's atten-

tion being particularly directed to the statute here in question. The Supreme Court reversed the decision of the trial court, held that equity had jurisdiction notwithstanding said statute, and said (p. 76):

> "The further contention of defendant that plaintiff may not maintain this action to enjoin the collection of the tax, because he might have had appropriate relief, if he was entitled to any, before the board of county commissioners, is also without merit. The sections of the statute referred to give him the absolute right to have his grievance heard by the county assessor and, if he does not get it there, an appeal to the district or county court, where he may again be heard. We are cited to no provisions of the statute which take away this right, *whatever may be the power of the board to grant relief after an erroneous tax has been paid.*" (Italics ours.)

And thereupon the case was remanded, with directions to the court below to enter a judgment enjoining the collection of the tax.

The foregoing decisions are not exceptions to the general rule, but voice the settled doctrine of the state courts, repeatedly enunciated.

In Insurance Co. vs. Bonner, 24 Colo., 220; 49 Pac., 366, decided in 1897, the action had been brought to enjoin the collection of a tax. No allegation or showing was made of cloud or threatened cloud upon title, or of any other matter bringing the case within any of the recognized heads of equity jurisdiction. Relief in equity was denied by the trial

court, and this was affirmed by the Supreme Court. The language of the Supreme Court's opinion makes it certain that, if any of the settled grounds of equity jurisdiction had been made to appear, such jurisdiction would have been retained and equitable and injunctive relief afforded. In the fourth syllabus (p. 220) it is said:

> "Injunctions to restrain the collection of the public revenue are not favored. That a tax is void is not, of itself, sufficient to justify the granting of a writ to restrain its collection. The case must, in addition, be made under some of the well recognized heads of equity jurisdiction."

In the opinion (p. 223) it is said:

> "That a tax is void is, of itself, not sufficient to justify the granting of a writ. The case must, in addition, be brought under the head of some of the well recognized heads of equity jurisdiction. Dows vs. Chicago, 11 Wall. 308. High on Injunctions (3rd ed.), Sec. 485 et seq."

In the series of sections thus referred to in High on Injunctions the author expressly states the doctrine that equity has jurisdiction to relieve against an invalid tax when it does or will create a cloud upon title, or when other established grounds of equity jurisdiction are presented.

High on Injunctions (3rd ed.), secs. 494 et seq.

And so in the Bonner case, *supra*, the court continues (p. 224):

> "Ordinarily the writ will not lie to restrain the collection of an illegal tax on personal property; and while it is only by inference that we are advised of the ownership by plaintiff of personal property, there is no allegation, or even inference, that the plaintiff is the owner of any real estate, the title of which might, by any possibility, be clouded."

And this is equivalent to holding that, if such facts had been made to appear, equity would have intervened; and in Charlton vs. Kelley, 24 Colo., 273; 50 Pac., 1042, decided in 1897, and reported in the same volume with the Bonner case, the Supreme Court expressly upholds jurisdiction in equity to relieve from an invalid tax and its results, where cloud upon the title to real estate is involved.

In Evans vs. Denver, 26 Colo., 193; 57 Pac., 696, decided in 1899, jurisdiction in equity was expressly invoked, upon the ground that the tax was a lien upon real estate, and that, if a sale occurred for said tax, the result would further cloud the title. The court below had dismissed the suit, which had been brought to enjoin the collection of the tax, but the Supreme Court reversed this result and remanded the case, with directions to the court below to enjoin such collection.

In Boston & Colorado Smelting Co. vs. Elder, 20 Colo. App., 96; 77 Pac., 258, decided in 1904, the suit was brought in equity to cancel a tax and enjoin

its collection. An examination of the record discloses that jurisdiction in equity was expressly founded upon the ground that the tax itself, and the deed which would be issued in case of sale, constituted clouds upon the title to plaintiff's real estate. A demurrer was filed, raising the question that the court of equity was without jurisdiction; which demurrer was sustained and the complaint dismissed by the trial court. The Court of Appeals reversed this judgment, upheld jurisdiction in equity, and remanded the case for a determination of the merits. This notwithstanding the statute here in question.

In Hallett vs. Arapahoe County, 40 Colo., 308; 90 Pac., 678, decided in 1907 (cited by the Supreme Court in the Singer Sewing Machine case), the court considered together four suits, which had been brought by the plaintiff to restrain the collection of taxes assessed for the years 1897, 1898, 1899, and 1900. The assessment was upon moneys, notes and credits, and Judge Hallett contested the same, because, he said, he did not own any such property. No real estate was involved. An examination of the records before the Supreme Court discloses that there was absolutely no allegation bringing the case within any of the recognized heads of equity jurisdiction. There was not even a statement of the legal conclusion that plaintiff "had no plain, speedy and adequate remedy at law." The sole allegation was that the tax was invalid, because the plaintiff did not own any such property, and it had been added to his assessment without notice. As the law then stood (Mills' Ann. Stats., Vol. 2, sec. 3771), taxes levied or assessed upon personal property were a lien upon that precise

property, and that only, "and if such property, so taxed, or any part thereof, shall be removed from the county wherein the same was taxed, or is so conditioned that the treasurer cannot find or obtain the same, then the county treasurer shall sue the person so taxed in an action of debt, in any court of his county having jurisdiction." Inasmuch as plaintiff averred that he had no such property as that which had been assessed, it is manifest that the only remedy of the treasurer was an action at law, in which plaintiff might have raised all questions as to the validity of the tax. The situation was exactly the same as that presented in Singer Sewing Machine Co. vs. Benedict, 179 Fed., 628, 633. And so, in the Hallett case, the Supreme Court held, as stated in the first syllabus:

> "Equity will not enjoin the collection of an illegal tax, unless the taxpayer has no adequate remedy at law, or its collection will result in irreparable injury to him, or lead to a multiplicity of suits;"

pointed out (pp. 315-318) the complete absence of any allegation of this nature, saying (p. 318):

> "By Section 3777, 2 Mills' Ann. Stats., it is provided that taxes paid which shall thereafter be found to be erroneous or illegal, shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded to plaintiff by this section is not adequate;"

pointed out that the complaints utterly failed to allege that the defendants had attempted, were attempting, or threatened to attempt to collect the tax, saying (p. 319):

> "So far as it appears from the record, he may never be called upon to pay these taxes, nor any steps taken to enforce their collection against him, so that it wholly fails to appear that any wrong has been, or will be, inflicted, which should be redressed;"

and the court reached its final conclusion (p. 319):

> "For the reason that the respective complaints do not state facts from which it appears that the plaintiff has been, or will be, injured because of the assessments complained of, and the taxes levied thereon."

From the language quoted above, and from other portions of the opinion, it is plainly inferable that, if proper averments had been made, bringing the case under some recognized head of equity jurisdiction, the ruling would have been different, notwithstanding the statute of Colorado.

In Board of Commissioners of Bent County vs. Atchison, T. & S. F. Ry. Co., 52 Colo., 609; 125 Pac., 528, decided in 1912 (the only Colorado case cited in the opinion of the Circuit Court of Appeals), the court considered a bill in equity, filed by the railway company, to enjoin the collection of a *county* tax, arising from what was alleged to be an illegal *county* levy, made to pay warrants issued for the construction of a county bridge. Neither the state nor any

city, town, or school district was interested therein. The amount of the tax complained of was fixed. It was all illegal or all legal, and this was a question of law. The case presented none of the features appealing to equity jurisdiction in the case at bar. An examination of the record discloses that there was neither allegation nor proof bringing the case within any recognized head of equity jurisdiction. Because of the total absence of any such allegation or showing, the court intimated that equity was probably without jurisdiction. It was clearly recognized, however, that, if such allegations or such showing had been made (as they are in the case at bar), the result would have been otherwise. In the first syllabus it is said:

> "Public interest, statutory enactment and judicial announcement are opposed to interference by injunction with the collection of public revenues. Whoever seeks such relief *must bring his case within some recognized ground of equitable jurisdiction.*" (Italics ours.)

And in the course of the opinion, after referring to the Colorado statute here in question, the court says (p. 614):

> "We do not hold that this statute affords an adequate remedy to the taxpayer in all cases founded upon an erroneous or illegal tax. We readily conceive that a case might arise in which the complainant would not have an adequate remedy by an action at law based upon the statute. Facts like those

in Cummings vs. National Bank, 101 U. S. 153, would bring a case within the exception. The case at bar, however, is not within the exceptions recognized by the authorities, and the trial court erred in taking jurisdiction of the case."

The Circuit Court of Appeals (217 Fed., 544, 545) seems to think that the Supreme Court of Colorado in the Bent County case, by its reference to the Cummings case, meant to hold that the only exception to the rule of non-interference by equity was that "in rare cases it may happen that the fraud of the taxing officers will create a condition which statutes like Section 5750 will not enable courts to redress," or when, as the Circuit Court of Appeals holds is true of the Cummings case, the state statute expressly provides a remedy by injunction. We have hereinbefore reviewed the Cummings case and the comment of the Circuit Court of Appeals thereon. It has been demonstrated, we submit, that the Cummings case was not based upon the Ohio statute, and could not have been. It was based upon settled and recognized grounds of equity jurisdiction, independent of the Ohio statute. These grounds were not only constructive fraud on the part of the taxing officers, consisting of repeated, systematic, and intentional discriminations in assessment, but also the grounds that a trust was involved and that a multiplictiy of suits would be avoided. The principle enunciated in the Cummings case was that a court of equity, and particularly a federal court of equity, would assume jurisdiction whenever invoked upon any of the well-settled and recognized grounds, notwithstanding a state statute

permitting payment of the disputed tax and a suit to recover it back. That this is so has been expressly declared by the Supreme Court.

In Allen vs. Baltimore & Ohio R. R. Co., 114 U. S., 311, the Cummings case was reviewed. In the Allen case, notwithstanding a statute of Virginia giving an adequate remedy at law, jurisdiction in equity was sustained. Such jurisdiction had been invoked upon the following grounds (p. 313):

> "That the acts complained of prevent the proper exercise by the complainant of its franchise, involving a public duty of operating the railroads of which it is lessee and in possession; to avoid multiplicity of suits; the want of adequate remedies at law; *to remove the cloud upon the title to the railroad property, occasioned by the fact that assessed taxes are a lien thereon.*" (Italics ours.)

And, speaking of jurisdiction of equity and remedy by injunction, the court says (p. 314):

> "The circumstances of this case bring it, so far as that remedy is in question, fully within the principle firmly established in this court by the decision in Osborne vs. the United States Bank, 9 Wheat, 739, *and within the terms of the rule as declared in Cummings vs. National Bank*, 101 *U. S.* 153, *quoted in the case of Poindexter vs. Greenhow.*" (Italics ours.)

And, as we shall presently demonstrate, Cummings vs. National Bank has been repeatedly cited by the

Supreme Court of the United States in support of the doctrine that in tax cases equity jurisdiction will attach, and equitable and injunctive relief be afforded, whenever any of the settled and recognized grounds of such jurisdiction are presented, without regard to whether a state statute or state policy authorizes or prohibits injunctive relief, or does or does not afford an adequate remedy at law, by payment and suit to recover back. These facts must have been known to the Supreme Court of Colorado when its opinion in Board of Commissioners of Bent County vs. Atchison, Topeka & Santa Fe Railway Co. was written, and the language of that opinion, as quoted above, amounts to an express adoption, as the law in Colorado, of the rule announced in Cummings vs. National Bank, *supra*, as construed in Allen vs. Baltimore & Ohio R. R. Co., *supra*, and numerous other decisions of the United States Supreme Court. A further consideration of the Colorado decisions makes this clear beyond question.

In Foster vs. Hart Mining Co., 52 Colo., 459; 122 Pac., 48, decided in 1912, and reported in the same volume with the case last above reviewed, a suit in equity had been brought to restrain the collection of taxes, alleged to be invalid, to procure the cancellation thereof and of certificates of sale issued thereon, and to prevent the issuance of tax deeds. An examination of the record which was before the Supreme Court discloses that jurisdiction was expressly invoked upon the grounds: (1) that the tax constituted a lien, and therefore a cloud upon the title to plaintiff's real estate, that the sales and certificates of sale likewise constituted such clouds, and that the deeds when issued would further cloud

said title; (2) that the illegal assessment which, it was alleged, rendered the tax invalid, was the result of disobedience of the law and the application of a wrong principle of assessment, which had been systematic, repeated, and intentional, and therefore constructively fraudulent; (3) that the intervention of equity would avoid a multiplicity of suits; (4) that the statutes of Colorado, particularly the statute now claimed to authorize payment of the tax and suit to recover it back, did not afford an adequate remedy. It appears from the record that the question of jurisdiction in equity was bitterly contested, both in the trial court and in the Supreme Court. It was argued at length in the briefs of both parties. But, notwithstanding the statute here involved, equity jurisdiction was sustained, and equitable and injunctive relief administered, both by the trial court and by the Supreme Court. The decision just referred to makes very clear what was meant by the Supreme Court when, at the same term and within a few weeks, it said, in the Bent County case, *supra*:

> "We do not hold that this statute affords an adequate remedy to the taxpayer in all cases founded upon an erroneous and illegal tax. We readily conceive that a case might arise in which a complainant would not have an adequate remedy by an action at law, based upon the statute."

In County of Teller vs. Acorn Mining Co., 23 Colo. App., 407; 130 Pac., 74, decided in 1913, there was involved a suit in equity, brought to enjoin the collection of a tax upon certain real estate, consisting of mining claims. We have examined the record,

from which it appears that equity jurisdiction was expressly invoked upon the ground that the tax and its results did and would constitute clouds upon the title to plaintiff's real estate. Such jurisdiction was contested by defendants, both in the trial court and in the Court of Appeals. It was, nevertheless, sustained, and equitable and injunctive relief administered and approved, notwithstanding the statute of Colorado relating to payments and refunds.

In State Board of Equalization vs. Bimetallic Inv. Co., 56 Colo., 512; 138 Pac., 1010, decided in January, 1914, jurisdiction in equity was entertained to enjoin the extending of an assessment alleged to be illegal, and the consequent creation of a tax which would be invalid, but would, nevertheless, constitute a cloud upon the title to plaintiff's real estate. We have examined the record in said case, from which it appears that jurisdiction was expressly invoked upon the grounds that it would prevent a cloud upon title to real estate and avoid a multiplicity of suits. Such jurisdiction was entertained by the trial court, and equitable and injunctive relief administered. The Supreme Court likewise entertained jurisdiction in equity, but decided the merits of the controversy against the plaintiff, holding that the assessment was, and the consequent tax would be, legal and valid.

In Bimetallic Investment Co. v. State Board of Equalization, 239 U. S., 441, decided December 20, 1915, the foregoing decision was affirmed. The objection of lack of equity jurisdiction was raised and expressly noticed in the opinion of this Court, as follows:

> "There are suggestions on the one side that the construction of the state constitution

and laws was an unwarranted surprise, on the other that the decision might have been placed, although it was not, on the ground that there was an adequate remedy at law. With these suggestions we have nothing to do. They are matters purely of state law. The answer to the former needs no amplification; that to the latter is that the allowance of equitable relief is a question of state policy, and that as the Supreme Court of the state treated the merits as legitimately before it, we are not to speculate whether it might or might not have thrown out the suit upon the preliminary ground."

In Price vs. Kramer, 4 Colo., 546 (cited by the Supreme Court in the Singer Sewing Machine case), no ground whatever of equitable jurisdiction appeared, the sole allegation being that the tax was invalid and illegal. No real estate was involved. The tax was upon certain cattle, and could be collected only by distraint of the particular cattle assessed. These cattle were ranging from one county to another, and the dispute was as to which county was entitled to tax the same. The taxes were those (p. 547) "assessed and levied by Pueblo County," and those (p. 548) "assessed and levied by Bent County," one or the other of which was claimed to be invalid. Therefore no possible multiplicity of suits appeared. Nothing was involved but a county tax—not that of the state, nor of any school district, city, or town. None of the grounds of equity jurisdiction inherent in the case at bar, none of those repeatedly approved by the state Supreme Court, in any way appeared.

Under such circumstances, the court said, applying a familiar principle (p. 555):

> "Against an illegal tax complainant has a full and adequate remedy at law, and we see no reason why *in this case* he should not be remitted to that remedy." (Italics ours.)

The court was careful to restrict its decision to the facts of the case before it.

In Woodward vs. Ellsworth, 4 Colo., 580 (also cited by the Supreme Court in the Singer Sewing Machine case), a bill in equity, and an injunction issued thereon to restrain the collection of a tax alleged to be illegal, were sustained, notwithstanding the Colorado statute and the remedy afforded thereby, which the court (p. 581) expressly noticed and commented upon. The property involved was personal property only, notwithstanding which jurisdiction in equity was sustained.

We have thus reviewed all of the Colorado cases cited by the Supreme Court in the Singer Sewing Machine case. We have also reviewed and analyzed the decision in the only Colorado case cited by the Circuit Court of Appeals in its present opinion. We have likewise presented and reviewed many other Colorado cases, particularly recent ones, not mentioned either by the court in the instant case or by the Supreme Court in the Singer case. These cases, we submit, demonstrate beyond all question that the Circuit Court of Appeals has erred respecting the construction, scope, and effect of the Colorado statute, as conclusively declared by the highest courts of that state. Not only did the court err in permitting the Colorado statute to limit in any way federal equity

jurisdiction, but it erred again when, after attributing to the Colorado statute a power which it could not possess, it gave it a construction and effect in the federal court of equity which state authority has never permitted it to have, even in the courts of Colorado.

(b) *Former decisions of the circuit court of appeals.*

Not only is the present opinion directly opposed to the decisions of the Colorado courts, but it is in irreconcilable conflict with former decisions of the Circuit Court of Appeals relating to the same statute.

In Atchison, T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, a case similar in many respects to the one at bar, relief had been denied by the Circuit Court for the District of Colorado, but its decree was reversed, jurisdiction in equity upheld, and the case remanded, with instructions to afford relief. The subject of jurisdiction in equity is discussed at pages 469-471. The Colorado statute here involved is dealt with at length. It is expressly held that the remedy afforded by that statute, if any, is not, and could not be, as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. In addition to that, it is held that the case falls within several of the well-settled and well-recognized heads of equity jurisdiction, such as fraud and mistake, and systematic, intentional continuing and repeated application of an illegal and unconstitutional principle of assessment; all of which require the exercise of federal equity jurisdiction, notwithstanding the Colorado statute. On the subject of the Colorado statute the court, speaking through his Honor Judge Sanborn, says (p. 470):

> "Counsel cite the statute of Colorado, which provides that the board of county com-

missioners shall refund all taxes paid by any person which are afterwards found to be erroneous or illegal (Laws Colo. 1902 (Ex. Sess.), p. 146, c. 3, Sec. 202), and contend that the complainant has an adequate remedy by an action at law based upon this statute. Conceding, without deciding, that it might maintain such an action to recover back the illegal portion of the tax against its property, is that remedy as adequate as the injunction of the court below? The adequate remedy at law which will deprive a court of equity of jurisdiction is a remedy as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. Williams vs. Neely, 134 Fed. 1, 10, 67 C. C. A. 171, 180, 69 L. R. A. 232; Boyce vs. Grundy, 3 Pet. 210, 215, 217, 7 L. Ed. 655; Springfield Milling Co. vs. Barnard & Leas. Mfg. Co., 81 Fed. 261, 265, 26 C. C. A. 389, 393; Brown vs. Arnold, 131 Fed. 723, 67 C. C. A. 125. The facts and the law of this case have been ably presented to and carefully considered by two courts, and all the material issues in it have been determined. The complainant now has and it is entitled to keep the $3,580 requisite to pay the illegal portion of its tax. An injunction in this suit will enable it to retain it, and will end this controversy here. In order to obtain any adequate relief at law, it must pay over this $3,580 to the defendant, must bring, try, and prosecute to judgment an action at law against the county to recover it back, must possibly, it may be probably, come again

> to this court for review of that trial, and then possibly, perhaps probably, prosecute a petition for mandamus to compel the levy of taxes to pay the judgment it shall recover, and after all this it will never secure more than a part of the actual expenses it will necessarily incur in prosecuting its action at law. This proposed remedy is neither as prompt, nor as certain, nor as complete, as the relief which may be granted through this suit in equity."

In Singer Sewing Machine Co. vs. Benedict, 179 Fed., 628 (also a case originating in Colorado), the foregoing decision was expressly reaffirmed, the court, speaking through his Honor, Judge Adams, saying (p. 632):

> "The statute of Colorado (Sec. 5750, Revised Statutes 1908, Sec. 202, Revenue Act, approved March 2, 1902, Session Laws Colorado, 1902, p. 146), providing that the board of county commissioners shall refund to the taxpayer any erroneous or illegal taxes which he has been compelled to pay, has been held by this court (Atchison, T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, 470) not to afford an adequate remedy to a taxpayer who has been required to pay an illegal tax, and we therefore omit further consideration of that statute as a basis for legal relief."

In the Singer Sewing Machine case equity jurisdiction was not sustained, because no ground whatever appeared upon which it could be founded, but the

court's previous action in upholding equity jurisdiction in the Sullivan case, notwithstanding the Colorado statute, was expressly reaffirmed and approved (p. 633). The court, quoting from the Sullivan case, pointed out that jurisdiction was there founded upon ancient and well-settled grounds, and concluded (p. 634):

> "We have no occasion or disposition to criticise the doctrine of that case, but it has no application to the pleadings or facts of this case."

Equity jurisdiction was sustained, notwithstanding remedies given by the state, and a like doctrine enunciated by the Circuit Court of Appeals in the following cases:

Western Union Telegraph Co. vs. Trapp, 186 Fed., 114, 121.

Ritterbusch vs. Atchison, Topeka & Santa Fe, 198 Fed., 46.

Wells Fargo & Co. vs. Johnson, 214 Fed., 180, 188.

The case last cited was decided on April 24, 1914, nearly a year after the decision in Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481. At page 188 the court, speaking through his Honor Judge Sanborn, expressly reiterates the doctrine of the Sullivan case, in almost exactly the same words.

It has since been affirmed.

Johnson vs. Wells Fargo & Co., 239 U. S., 234, 243.

(c) *Singer Sewing Machine Co. vs. Benedict, 229 U. S., 481, establishes no new rule, enunciates no different doctrine, nor does it overrule prior decisions of the Supreme Court or those of the Circuit Court of Appeals or the Colorado Supreme Court.*

Did the Supreme Court in the Singer case intend to reverse the hitherto unruffled current of its decisions? Did that case mark the point at which the course theretofore pursued in an unbroken line was abandoned, and exactly the opposite course of decision entered upon? We earnestly contend that it did not. No question was presented in the Singer case which called for or permitted such a result. A brief consideration of the facts there involved makes this manifest.

The case arose in the City and County of Denver, a consolidated municipality, wherein since 1902 there has been but one government both for city and county affairs (Const. of Colo., Art. XX; Rev. Stats. 1908, pp. 55 et seq.), and but one school district embracing the entire city and county (Const., Art. XX, sec. 7; Rev. Stats. 1908, sec. 759), all funds, both of the city and county and the school district, being held in one treasury and in the custody of a single treasurer.

In the year 1905 the company made a return to the assessor of taxable personal property, disclosing a certain value. Thereafter the assessor, without notice to the company, as alleged, enormously increased the amount and value of the personal property as returned. Thereafter a tax list or warrant authorizing the collection of the tax on the total amount of the personal property, as increased by the assessor, was delivered to the city and county treasurer, whose duty it became to collect the tax assessed thereon. The

company tendered taxes upon the original amount as returned by it. It disputed the right to collect the remainder. The sole ground of the claimed invalidity of the tax was the failure of the assessor to give notice of the increase. It was also the sole ground upon which jurisdiction in equity was invoked.

No tax upon real estate was involved, for the tax was expressly laid upon the assessment of personal property.

No real estate was involved, because the company had none.

It was not even necessary to protect personal property from distraint, because, as the record expressly shows, the only property of any kind which the company had ever had in the City and County of Denver consisted of certain moneys, notes, and credits, and these had been removed from the state prior to the attempt to enforce the tax (179 Fed., 632, 633).

No repeated or systematic under- or over-assessmen or application of a wrong principle of assessment was involved. The cause of action was based upon the single omission in one specific instance of a certain notice.

No involved issues appeared requiring complicated evidence for their solution; for the cause of action depended upon a single fact—to-wit, the alleged omission of the notice and its legal result. The proof was as simple as in a suit upon a promissory note.

No multiplicity of suits was involved, because, if the tax was invalid and could be recovered back in an action at law, only one action was necessary against the consolidated municipality.

No interference with property devoted to a public use, and consequent injury to the public, was in-

volved, because (1) a sewing-machine company is not a public-service corporation, and its property is not devoted to a public use, and (2) it had no property within the jurisdiction of the taxing authority.

As we have repeatedly pointed out, all of these well-recognized and settled grounds of equity jurisdiction appear in the case at bar.

As the Circuit Court of Appeals said in the Singer case (179 Fed., 630):

> "There are no averments in the bill showing any fraud, accident or mistake which conduced to the overvaluation, any cloud upon title to real estate, or danger of multiplicity of suits, or any averments planting complainant's right to relief upon any other head of equity jurisdiction excepting inadequacy of the legal remedy."

Under the circumstances recited above, the court held that the only method by which the treasurer could have undertaken to collect these taxes was by the action at law therefor against the delinquent taxpayer expressly authorized by section 5677 of the Revised Statutes (179 Fed., 633). In this suit the company might interpose as defenses all of its objections to the tax. This was regarded as an adequate remedy at law, which, in the absence of any of the recognized grounds of equity jurisdiction, prevented a federal court of equity from entertaining the suit.

The decree of the Circuit Court of Appeals was affirmed by the Supreme Court. Did the latter court intend to overrule the process of reasoning by which the lower court arrived at its decision? Did the

Supreme Court intend to hold that, in a case where jurisdiction in equity is invoked upon any of the grounds which would have supported it in the High Court of Chancery in England in 1789, such jurisdiction is or can be ousted, limited, or controlled by any statute of a state? We respectfully submit that it did not, and that its opinion is clear evidence of the fact. Even if the learned writer of that opinion had in terms announced such doctrine, the statement would have been an interesting observation, but not an authority; for no such question was, or could be, involved. Such a situation, if it had arisen, would have been controlled by the famous and oft-quoted words of Chief Justice Marshall in Cohens vs. Virginia, 6 Wheat., 264, 399:

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

But the Supreme Court in the Singer case did not so hold, because it could not. It did not intend so to hold, as is manifest from the language of the opinion. On the contrary, it reiterated and adhered to the settled doctrine now relied upon by us and enunciated repeatedly in the many decisions hereinbefore cited. This also is manifest from the language of the opinion.

In delivering the opinion of the Supreme Court in the Singer case (229 U. S., 481), Mr. Justice Van Devanter first reviewed the facts, which clearly showed that no matter of equitable cognizance was presented, and that the case did not fall within any of the heads of equity jurisdiction recognized and given effect in the High Court of Chancery in England in 1789. Thereupon the court, quoting from one of its former decisions, said (p. 485):

> "In such a case the aggrieved party is referred to his remedy at law, when that remedy is as complete, practicable and efficient as the remedy in equity."

Thereupon the learned justice referred to the Colorado statute here involved, quoting a portion thereof, and citing three Colorado cases, all of which, as well as many other Colorado cases, have been reviewed in a previous portion of this brief. He then stated (p. 486):

> "We refer to these cases, not as defining the jurisdiction in equity of the circuit court, *for that they could not do* (citing cases), but as showing that the Colorado

> statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid." (Italics ours.)

This statement is to be considered in view of the fact that such a recovery would in the Singer case be had in a single suit against the consolidated municipality, the City and County of Denver, which represented in one entity the state, the county, the city, and the school district, as hereinabove pointed out.

The Supreme Court's opinion then proceeds as follows (p. 487):

> "Such a remedy, as this court often has held, is plain, adequate and complete in the sense of the guiding rule before named, *unless there be special circumstances showing the contrary.* Dows vs. Chicago, 11 Wall. 108, 112; State Railroad Tax Cases, 92 U. S. 575, 613-614; Shelton vs. Platt, 139 U. S. 591, 597; Allen vs. Pullman's Palace Car Co., id. 658, 661; Indiana Mfg. Co. vs. Koehne, 188 U. S. 681, 686." (Italics ours.)

The Supreme Court thereupon considered the two contentions which alone were advanced by the company as presenting recognized grounds of equity jurisdiction, which would uphold it in spite of the adequate remedy at law. These were: (1) that the tax list conclusively determined all questions in favor of the validity of the tax; but the Supreme Court pointed to the express provision of the Colorado statute, that it should be *prima facie* evidence only; (2) that the act of the assessor in making the additional

assessment, without giving notice, was a fraud, an accident, or a mistake, and therefore within the jurisdiction of equity; but the Supreme Court pointed out that no such ground of equity jurisdiction was alleged in the bill, and that, in any event, the omission on a single occasion, in a specific instance, to give a certain notice was not a fraud, an accident, or a mistake of the kind which, under the previous decisions of the court, would uphold resort to equity. That, as we have repeatedly said, and as the Supreme Court and the Circuit Court of Appeals have time and again stated, must consist of systematic, repeated, and intentional over- or under-assessment, violation of statute, or application of an illegal or unconstitutional principle of assessment, and not an isolated case of one failure to obey a statute requiring notice, which failure might have been inadvertent. Where, however, fraud of the required kind, such as is defined above, does appear, the court of equity has always entertained jurisdiction, and the Supreme Court in the Singer case, by the clearest possible inference, holds that it should.

What are the "special circumstances showing the contrary," referred to by the Supreme Court at page 487, which will uphold equity jurisdiction, notwithstanding a state-given remedy at law? The question is answered by the authorities cited by the Supreme Court in support of the statement.

In Dows vs. Chicago, 11 Wall., 108, none of the settled grounds of equity jurisdiction were made to appear. The court said (p. 109):

> "No *special circumstances* respecting the tax or its enforcement were alleged in

support of the equitable jurisdiction of the court. * * * The illegality of the tax and the threatened sale of the shares for its payment constitute, of themselves alone, no ground for such interposition. There must be some *special circumstances* attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. * * *" (P. 110) "It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked. * * *" (P. 112) "And, except where the *special circumstances which we have mentioned* exist, the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the officer making the collection or the body to whom the tax is paid. Here such remedy existed. * * * Nor would he have been compelled to resort to a multiplicity of suits to determine his rights. His entire claim might have been embraced in a single action." (Italics ours.)

In the foregoing quotation we have italicized the words "special circumstances" to emphasize the fact that the phrase is, beyond question, used by the Supreme Court in the Singer Sewing Machine case in

the same sense in which it is employed in Dows vs. Chicago. That being true, it admits of no doubt that what the court intended to hold, and did hold, in the Singer Sewing Machine case, and what is expressed in the most unmistakable way, was that, notwithstanding the remedy at law, if any, afforded by the Colorado statute, the federal court of equity could, and should, entertain jurisdiction whenever such "special circumstances" existed as the avoidance of a multiplicity of suits, or other irreparable injury, or, where the property is real estate, the prevention or removal of cloud upon the title.

State Railroad Tax Cases, 92 U. S., 575, presented another instance where none of the recognized grounds of equity jurisdiction whatever appeared. The court again defined, and in the same manner, the "special circumstances" upon which jurisdiction in equity might be invoked, citing and quoting from Dows vs. Chicago, *supra*. The court said (p. 614):

> "There must be an allegation of fraud, that it creates a cloud upon the title, that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction;"

and concludes upon this branch of the case as follows (p. 615):

> "In the examination which we have made of these cases, we do not find any of the matters complained of to come within the rule which we have laid down as justifying the interposition of a court of equity. There is no fraud proved, if alleged. There

> is no violation of the Constitution, either in the statute or in its administration by the board of equalization. No property is taxed that is not legally liable to taxation, nor is the rule of uniformity prescribed by the Constitution violated."

In Allen vs. Baltimore & Ohio R. R. Co., 114 U. S., 311, 315, the opinion in the State Railroad Tax Cases, *supra,* is cited, and the foregoing quotations therefrom are made; and, referring thereto, the court says:

> "If the facts here negatived had been affirmed, the converse of the rule would have been equally applicable."

And the court sustained jurisdiction in equity, notwithstanding a full, complete, and adequate remedy at law afforded by the statute of Virginia, which conclusively demonstrates that the Supreme Court regards the State Railroad Tax Cases, *supra,* as definite authority supporting jurisdiction in equity, when invoked upon such grounds as are presented in the case at bar. Indeed, Dows vs. Chicago, *supra,* and State Railroad Tax Cases, *supra,* have been cited by the Supreme Court times without number as authorities supporting jurisdiction in equity, whenever any of the "special circumstances" mentioned in those decisions appear. An inspection of Rose's Notes on the United States Reports, or any other standard list of annotations, demonstrates this.

Shelton vs. Platt, 139 U. S., 591, 597; Allen vs. Pullman's Palace Car Co., id., 658, 661; Indiana Mfg. Co. vs. Koehne, 188 U. S., 681, 686, the other cases

cited at this point in the Supreme Court's opinion in the Singer case, have been hereinbefore reviewed. We need not repeat what was there said. It is sufficient to say that in none of those cases did any recognized ground of equity jurisdiction appear, and that in all of them the "special circumstances" under which such jurisdiction would attach were specified, and that the "special circumstances" so specified in each instance clearly exist and have been pointed out in the case at bar.

In the late case of Raymond vs. Chicago Union Traction Company, 207 U. S., 20, all of these decisions are reviewed, their effect stated, and jurisdiction upheld, upon grounds which cannot be distinguished from those here presented.

Under such circumstances, how can it possibly be said that the opinion of the Supreme Court in the Singer Sewing Machine case is an authority supporting the proposition that equity jurisdiction does not exist because of the Colorado statute, and notwithstanding the presence of all of the "special circumstances" there distinctly held to be sufficient to support such jurisdiction? On the contrary, is it not perfectly clear that the opinion of the Supreme Court in the Singer Sewing Machine case takes its place in the lengthy array of the numerous other like decisions of that court, as authority in support of the settled doctrine that, when such "special circumstances" exist as are shown in the case at bar, the federal court of equity will, and must, assume jurisdiction, notwithstanding the Colorado statute, and notwithstanding any state statute or state-given remedy, however certain, comprehensive, or complete?

If it had been the intention of the Supreme Court

to overrule the decision in Atchison, Topeka & Santa Fe R. R. Co. vs. Sullivan, 173 Fed., 456, would it not have said so expressly? That case was cited in the briefs, was before the court, and was not mentioned. The only explanation of this omission is that the Supreme Court did not intend to overrule the Sullivan case, and considered that the distinction between it and the Singer case was too obvious to require comment.

If it had been the intention of the Supreme Court to reverse, or in any respect criticise, the process of reasoning by which the Circuit Court of Appeals arrived at its conclusion in the Singer case, would it not have said so expressly? This it did not do, but, on the contrary, affirmed that court's decision and called attention to an additional reason by which it was supported.

If it had been the intention of the Supreme Court to overrule the long line of its own previous decisions, to which we have adverted, would it not have said so; and would it not have made express mention of at least some of the prior decisions so overruled? This it did not do. On the contrary, the language and reasoning of the opinion and the authorities cited specifically uphold and reiterate the doctrine which demands the interposition of equity in the case at bar.

As has been recently stated, it is not at all the practice of the Supreme Court "to depart from its prior rulings, either lightly or *sub silentio.*"

Stuart vs. Union Pacific, 178 Fed., 753.

The foregoing observation was made by the same learned judge who later wrote the opinion of the Supreme Court in the Singer Sewing Machine case. If

in the latter case Mr. Justice Van Devanter had intended to overrule prior decisions of the Supreme Court, it admits of no doubt that he would have done so expressly. Not having done so expressly, the conclusion is irresistible that he did not intend to do so at all.

We therefore respectfully submit that the decision of the Supreme Court in the Singer Sewing Machine case not only is not an authority supporting the opinion of the Circuit Court of Appeals in the present case, but, on the contrary, is in irreconcilable conflict therewith, and destroys the foundation upon which said opinion rests.

This is made manifest by its subsequent decisions.

Ohio Tax Cases, 232 U. S., 576, 587.

Johnson vs. Wells Fargo & Co., 239 U. S., 234, 244.

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6. *Equity jurisdiction is here invoked upon several well-settled and well-sustained grounds, such as were clearly recognized and would certainly have upheld such jurisdiction in the High Court of Chancery in England in 1789. The Constitution and laws of the United States forbid the renunciation of such jurisdiction, whatever be the provisions of the Colorado statute.*

The Circuit Court of Appeals having held, as it did (217 Fed., 544), that the Colorado statute afforded a remedy which was exclusive, and not cumulative; that it was intended to, and did, oust the jurisdiction in equity in the federal as well as in the state courts;

that under such circumstances it does not "lie with the courts to say that the remedy which the legislature has provided is inadequate, and that the remedy which it has condemned shall therefore be continued;" that to do so "would be to make the law of no effect through the traditions of equity," and would "not only be judicial legislation, but would nullify a statute which is conceded to be constitutional;" that the statute "abolishes the right to stay the collection of public revenue by injunction," not only in the state, but also in the federal courts; that "the courts may not rightfully nullify it upon the ground that the remedy which it gives is less adequate than the one which it takes away," and that "the statute being constitutional, the judgment of the legislature on that subject must control," not only in the state courts, but also in the federal courts—having held all this, as the court expressly did, it is obvious that the court gave scant, if any, consideration to the several grounds of equity jurisdiction clearly alleged and fully sustained by the plaintiff. For, if the court's ruling be correct, those grounds, whatever they might be, could not avail against the state statute, as construed by the court.

Nevertheless, both by averment and proof, several well-settled and anciently recognized grounds of equity jurisdiction were made to appear.

(a) *Systematic, continued, and repeated wrongful discrimination in assessment and the application of an illegal or unconstitutional principle of assessment which is held to be at least a constructive fraud, and therefore within the ancient jurisdiction of equity to relieve therefrom.*

Such a situation is clearly alleged in the bill.

The allegation is, we submit, amply supported by the proof.

Such a course of action as is here alleged and proved constitutes at least a constructive fraud. For this reason alone this case is within the jurisdiction of equity. Equity will relieve from the results thereof upon a principle analogous to that which supports equity jurisdiction in cases of repeated trespass. Upon such grounds as these the High Court of Chancery in 1789 would and should have intervened. Therefore, such conditions not only render the tax invalid, but require the interposition of equity. This is settled by repeated decisions, both of the Supreme Court and of the Circuit Court of Appeals.

A. T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, 471.

Ritterbusch vs. A. T. & S. F. Ry. Co., 198 Fed., 46.

Wells Fargo & Co. vs. Johnson, 214 Fed., 180, 189.

Johnson vs. Wells Fargo & Co., 239 U. S., 234, 244.

Cummings vs. Bank, 101 U. S., 153, 157, 158.

National Bank vs. Kimball, 103 U. S., 732, 733.

Poindexter vs. Greenhow, 114 U. S., 270, 295.

Stanley vs. Supervisors of Albany, 121 U. S., 535, 550, 551.

San Francisco National Bank vs. Dodge, 197 U. S., 70, 75, 81, 108, 109, 110.

Cooley on Taxation (3d ed.), Vol.. 2, pp. 1459, 1460.

And in the foregoing cases jurisdiction in equity founded upon this ground has been upheld, notwithstanding the statute of Colorado here referred to, and also notwithstanding statutes of other states of like character, but much more comprehensive and complete. Thus, in A. T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, at 470, the court, speaking through His Honor, Judge Sanborn, said:

> "The systematic and intentional omission of watches, clocks and jewelry, credits and fat stock, by the county assessor from the assessment of the property within his jurisdiction, however innocent in actual intention, was either an intentional fraud upon the complainant or such a gross mistake that it was a fraud in law. * * * Not only this, but the omission of the fat stock and the credits had been repeated by the officials of this county year after year. It was their habitual practice to omit them, and this practice threatened to continue. It had grown into a rule, and yet it was a violation of the constitution of the state, which requires that 'all taxes * * * shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal,' (Art. X, sec. 3) and of the statute which required all personal property not exempt to be assessed. It was systematic, intentional and contin-

> uing, and where there is a systematic, intentional, continuing omission or undervaluation of other taxable property by the taxing officers of a state or county, in violation of the constiution or law, which inevitably effects an unjust discrimination in taxation against the property of the complainant and against other property similarly situated, a bill in equity will lie to enjoin the collection of that portion of the tax which resulted from the illegal discrimination. (Citing many cases.) The facts of this case bring it under this rule, and the decree below must be reversed."

This ruling was made in spite of the statute of Colorado here involved, which was expressly brought to the attention of, and considered by, the court. The facts in this regard involved in the Sullivan case are very similar to those involved in the case at bar, except that here, in our judgment, the facts more strongly demand the interposition of equity.

In Wells, Fargo & Co. vs. Johnson, 214 Fed., 180 (decided April 24, 1914), the court, speaking through His Honor, Judge Sanborn, said (p. 188):

> "Finally, counsel for the defendant argue, as we understand their brief, that, although the law under which the assessments were made is unconstitutional and the assessments and taxes are void, still the plaintiffs are entitled to no injunction against their collection * * *." (P. 189) "(3) Because the plaintiffs have an adequate remedy at law; but this is the second time this

board has made in the same way unlawful assessments of the property of these plaintiffs, which effect an unjust and unconstitutional discrimination in taxation against them and their property. Its action has been systematic and repeated, and a systematic, repeated, continuing violation of the constitution or the law, to the injury of the plaintiff, like a continuing trespass, presents ample reason for an injunction against its continuance." (Citing A. T. & S. F. Ry. Co. vs. Sullivan, *supra,* and again citing the same list of authorities which had theretofore been cited in the Sullivan case, and which include Cummings vs. National Bank, *supra,* and many other cases cited in this brief.)

The foregoing decision was made in view and in spite of the right to pay the tax and recover it back in a suit at law, which was expressly noticed and commented upon in that portion of the opinion which immediately followed. It has been fully affirmed.

Johnson vs. Wells, Fargo & Co., 239 U. S., 234, 243, 244.

In Cummings vs. National Bank, 101 U. S., 153, 157, 158, jurisdiction in equity was entertained upon this ground, "independently," as the court said, of a statute of Ohio which authorized relief by injunction in tax cases, and in spite of a statute of Ohio which gave full, complete, and adequate remedy at law by payment and action to recover back. This case has hereinbefore been fully reviewed.

In the present opinion the court seems to think

that fraud of this nature, which will invoke the jurisdiction of equity, is of a very rare kind (which the court deos not define), and that the Cummings decision was based upon the Ohio statute authorizing injunctions in tax cases. That the court was wrong in the second assumption we have hereinbefore, we hope, demonstrated. That the court was wrong in the first assumption is clearly demonstrated by the fact that it cited the Cummings case in support of equity jurisdiction under circumstances of like character, but less persuasive than those here presented (Wells, Fargo & Co. vs. Johnson, *supra*); that it did likewise in A. T. & S. F. Ry. Co. vs. Sullivan, *supra;* and that the Supreme Court of the United States has repeatedly done so in many cases where there was a total absence of a state statute authorizing injunctive relief, and in spite of a state statute affording an adequate remedy at law. The recent decision in San Francisco National Bank vs. Dodge (197 U. S., 70) is an example. That case arose in California, where a state statute exists giving a most comprehensive remedy at law by payment under protest and action to recover back (197 U. S., 109). There is no statute in California authorizing resort to equity in tax cases. The suit was to enjoin the collection of the tax. Jurisdiction in equity was invoked and sustained upon the ground of systematic application of a wrong principle of assessment, resulting in unlawful discrimination. Cummings vs. National Bank, *supra*, was cited in support of such jurisdiction (197 U. S., 75), thus conclusively demonstrating that in the Cummings case equity jurisdiction had not been based upon the Ohio statute permitting injunctions. The following excerpt from the opinion indicates the

nature of the ground upon which jurisdiction in equity was upheld and equitable and injunctive relief afforded (p. 81):

> "From this analysis it results that in the one case, that of national banks, not only the value of all the tangible property, but also the value of all the intangible elements above referred to, is assessed and taxed, whilst in the other case, that of state banks and other moneyed corporations, their property is taxed, but the intangible elements of value which we have indicated are not assessed and taxed, the consequence being to give rise to the discrimination against national banks and in favor of state banks and other moneyed corporations, forbidden by the act of Congress."

In the case at bar reliance is placed upon a like discrimination, created in a similar manner, and forbidden by the Constitution of the State of Colorado. In the San Francisco National Bank case, *supra*, the existence of the California statute and the remedy at law which it afforded were expressly brought to the attention of the court, and it was insisted that thereby jurisdiction in equity was ousted. This is evident from the vigorous dissenting opinion (197 U. S., 108 et seq.), in which the California statute is quoted at length. But by the majority opinion this contention was expressly negatived.

(b) *Cloud on Title.*

The bill alleges and the answer admits that plaintiff's property in Weld County, against which this tax

is levied and from which it must be collected, consists largely of real estate—to-wit, a railroad, with its right-of-way, station buildings, and other appurtenances. The statute of Colorado (Rev. Stat. 1908, sec. 5530) expressly provides that taxes shall from the time of their levy be a perpetual lien upon real estate. Express provision is made for the sale of railroad property to satisfy delinquent taxes (Rev. Stat. 1908, secs. 5769, 5770, 5771, 5774, 5777) and the giving of a deed therefor, with apparently no right of redemption, which deed shall be *prima facie* evidence of the legality of the tax and the regularity of the proceedings (Rev. Stat., sec. 5730). Prior to sale the treasurer's books, the assessment rolls, and the tax warrants have the same legal and evidential effect (Rev. Stat. 1908, sec. 5535). Therefore the tax itself, being a lien, constitutes a cloud upon the title. The sale and the deed to follow will be additional clouds, and if, as is true here, the facts which render the tax invalid do not appear upon the face of the record, a perfect case is presented for relief in equity. One purpose of this suit is to remove and prevent such clouds upon the title to plaintiff's real estate. This is an ancient ground of equity jurisdiction. It prevailed in the High Court of Chancery in England in 1789. It became, therefore, a part of the permanent equity jurisdiction of federal courts. No state statute can lessen its effect. This is expressly held in McConihay vs. Wright, 121 U. S., 201, 205. It is likewise held in many of the other cases cited in the preceding pages. It has been repeatedly ruled that this ground alone will in tax cases sustain the equity jurisdiction of federal courts, notwithstanding the existence of a remedy at law given by a state statute

analogous to that of Colorado, as construed by this court.

Dows vs. Chicago, 11 Wall., 108, 110.

U. P. Ry. Co. vs. Cheyenne, 113 U. S., 516, 525.

Allen vs. Baltimore & O., 114 U. S., 311, 313, 315.

Ogden City vs. Armstrong, 168 U. S., 224, 238.

Ohio Tax Cases, 232 U. S., 576, 587.

Taylor vs. Louisville & Nashville, 88 Fed., 350, 357, 358; certiorari denied, 172 U. S., 647.

Brown vs. French, 80 Fed., 166, 168.

Huntington vs. R. R. Co., 2 Sawy., 503, 514; Fed. Cas. No. 6911.

Cooley on Taxation (3d ed.), Vol. 2, pp. 1449 et seq.

The court in the present opinion recognizes the force of these authorities, but states (217 Fed., 544):

> "Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted."

No cases are cited in support of this statement. We respectfully submit that none can be found. We further respectfully submit that the statement vio-

lates fundamental principles repeatedly declared and applied by the federal courts. The court's statement is wrong, because it violates the fundamental principle, clearly stated in National Surety Co. vs. State Bank, 120 Fed., 593, 603, and repeatedly enunciated both by the Circuit Court of Appeals and by the Supreme Court in other cases, that—

> "Unless changed by subsequent acts of congress, the adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States is that which existed when that jurisdiction was vested—that which was when the act of 1789 was adopted. * * * As there were no adequate remedies at law for a wrong of the character of that of which the appellants complain in 1789, and as the congress has since provided none, this case falls within the equitable jurisdiction of the Circuit Court and must be there heard, determined and relieved."

No one will claim that in 1789 there was a remedy at law to remove or prevent a cloud upon title.

But the assertion of the Circuit Court of Appeals is further wrong, because plaintiff's right in equity is now perfect and it is entitled to relief. It has no right at law, even under the Colorado statute, until it has paid the illegal and invalid tax. But it is under no obligation to pay an illegal tax. It is entitled, if it chooses, to stand upon its rights and protect its property by resisting the collection thereof, even

though it be denied relief in equity. This right it cannot be deprived of by any state statute.

Allen vs. Baltimore & O. R. R. Co., 114 U. S., 311.

Wells, Fargo & Co., vs. Johnson, 214 Fed., 180, at 189.

It follows that the right to recover back the tax is not now in being, and may never exist. The court's dictum would require plaintiff to destroy a perfect existing right in equity, and to bring about a total change of conditions by the expenditure of its money in payment of an illegal tax which it is under no obligation to pay, and thus *possibly* to create a legal right to recover that money back, which, until the instant of its payment, had no existence at all. We respectfully submit that this is violative of fundamental principles of equity jurisprudence.

(c) *Prevention of interference with plaintiff's duties as a common carrier, and consequent injury to the public.*

The bill expressly alleges that any attempt to collect this tax by the statutory methods would seriously interfere with the operation of plaintiff's railway, and consequently with the performance of its duties to the public as a common carrier, and to the United States as a carrier of mails. These allegations are not denied by the answer. Thereby a perfect ground of equity jurisdiction is presented without dispute, which has been fully recognized by the Supreme Court in like cases, and held to justify

the interposition of equity, notwithstanding a state statute which afforded an adequate remedy at law.

Allen vs. Baltimore & O. R. R. Co., 114 U. S., 311, 313, 317.

Raymond vs. Chicago Union Traction Co., 207 U. S., 20, at 40.

(d) *Complicated evidence and involved issues requiring a process analogous to an accounting, and the machinery and methods of a court of equity for their proper consideration and determination.*

The jurisdiction of equity in matters of account is ancient. The ground of such jurisdiction was the difficulty, not to say impossibility, of submitting such issues to a jury in an action at law with any hope of a just result. The decisions of courts of equity, both English and American, have settled the doctrine that, even though no mutual accounting be required, nevertheless equity has jurisdiction if involved issues are presented to be solved upon complicated evidence, requiring the deliberate methods and trained investigators of a court of chancery to insure a just result. Whenever it appears that the evidence and the issues are such that in the hurry of a trial at law they could not be submitted to a jury without great likelihood of confusion, and except at the risk of hasty consideration and improper determination, equity will assume jurisdiction. In U. S. vs. Howland, 4 Wheat., 108, as early as 1819 Chief Justice Marshall, after referring to a statute of Massachusetts which gave a remedy at law, said (p. 114):

> "Still the remedy in chancery, where all parties may be brought before the court, is more complete and adequate, as the sum actually due may be there in such cases ascertained with more certainty and facility."

In Ex Parte Young, 209 U. S., 123, 164, equity jurisdiction was expressly upheld upon the ground that proof of the facts necessary to show the invalidity of the state-made rates was so intricate and involved that it could not be produced before a jury with any hope of a just result; the court saying:

> "Such investigation it would be almost impossible to make before a jury, as such body could not intelligently pass upon the matter. Questions of the cost of transportation of passengers and freight, the net earnings of the road, the separation of the cost and earnings within the state from those arising beyond its boundaries, all depending upon the testimony of experts and the examination of figures relating to these subjects, as well, possibly, as the expenses attending the building and proper cost of the road, would necessarily form the chief matter of inquiry, and intelligent answer could only be given after a careful and prolonged examination of the whole evidence and the making of calculations based thereon. * * * From all these considerations it is plain that this is not a proper suit for investigation by a jury."

And so the court upheld jurisdiction in equity, although there was a remedy at law.

The observations of the Supreme Court quoted above are distinctly applicable to the case at bar. The issues are numerous, intricate, and involved. The evidence to sustain them is necessarily complicated, technical and voluminous. It admits of no doubt that a jury in an action at law would be incompetent to deal with such questions and such evidence, and come to a just conclusion. The gist of this suit is unlawful discrimination in assessment. There are many subordinate issues. The evidence necessary to sustain the charge of discrimination and to show its illegality is necessarily extremely voluminous, complicated, and technical, and in many respects partakes of the nature of an accounting. Even upon the preliminary hearing, as the record discloses, many days were consumed in making the showing upon which the application for temporary injunction was submitted. A perusal of the record must convince that such evidence could not be submitted to a jury in a trial at law with any hope of a just or logical result. It need not be said that upon the final hearing the evidence will be still more voluminous and complicated, because then the showing must be complete. It admits of no doubt that upon this ground alone it was and is the duty of the court of equity to retain the bill, investigate the facts, and administer justice thereon according to the methods and practice of chancery. The Circuit

Court of Appeals has under similar circumstances repeatedly so held.

Gunn vs. Brinkley Car Works Co. (C. C. A., 8th Cir.), 66 Fed., 382, 384.

Hayden vs. Thompson (C. C. A., 8th Cir.), 71 Fed., 60, 63.

McMullen Lumber Co. vs. Strother, 136 Fed., 295, 302.

Castle Creek Water Co. vs. City of Aspen (C. C. A., 8th Cir.), 146 Fed., 8, 14.

Butler Bros. Shoe Co. vs. U. S. Rubber Co. (C. C. A., 8th Cir.), 156 Fed., 1, 21.

Inhabitants of Cranford vs. Watters, 61 N. J. Eq., 284.

This was one of the ancient grounds of equity jurisdiction existent and recognized by the High Court of Chancery in 1789, as is evident from the English authorities collected in Inhabitants of Cranford vs. Watters, *supra*.

The learned court below recognized the force of this contention and for reply thereto, in the opinion upon petition for rehearing, said (222 Fed., 658):

> "If, however, the ascertainment of the amount of refund to which plaintiff would be entitled should involve issues so complex as to support a resort to equity, it may go into equity for that purpose. That, nevertheless, would furnish no ground for an injunction to stay the collection of the tax, the denial of which is the basis of this appeal."

But this is equivalent to saying that jurisdiction in equity otherwise perfect must be renounced because the suitor has a right in some other equitable proceeding, at a later date and under different circumstances to obtain some relief. Hitherto it has been our understanding that the remedy which would oust equity of its jurisdiction must be a remedy at law, and not another and a different remedy in equity. We have supposed that when equity once obtained jurisdiction it retained it for all purposes. With the utmost respect, we venture to assert that the conclusion of the learned court below upon this point is in conflict with fundamental principles of equity jurisprudence. This thought is emphasized when we consider that the other suit in equity to which we are remitted by the learned court below is one the right to bring which does not now exist and can never come into being unless and until we elect to pay and do pay the illegal exaction which we are under no obligation to pay. We respectfully submit that the learned court below fell into error when it renounced equity jurisdiction because of another and a different remedy which itself could only be enforced in equity, and the enforcement of which at all was conditioned upon the payment of the illegal exaction relief from which is here sought.

(e) *Multiplicity of suits.*

The avoidance or prevention of a multiplicity of suits is a familiar branch of equity jurisdiction. It was a favorite ground upon which jurisdiction was entertained by the High Court of Chancery in Eng-

land in 1789. It has frequently been applied to cases involving illegal taxation.

Dows vs. City of Chicago, 11 Wall., 108, 110, 112.

Union Pacific vs. Cheyenne, 113 U. S., 516, 525, 527.

Fargo vs. Hart, 193 U. S., 490, 503.

Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 39, 40.

As is demonstrated by the cases cited above and in the preceding pages hereof, this ground alone has frequently been held to be sufficient to sustain in tax cases the equity jurisdiction of a federal court, notwithstanding the existence of a remedy at law given by a state statute. In the case at bar the bill avers that, if the taxes in dispute were paid by or collected from plaintiff, the county treasurer would immediately distribute the same to the County of Weld, to the State of Colorado, and to various school districts, cities, and towns in said county, from which it could never be recovered; and that, if plaintiff ever succeeded in recovering any portion thereof, it could only do so after expensive, long, and vexatious litigation and a multiplicity of suits. The evidence shows that the total amount of taxes claimed from plaintiff —to-wit, $77,818.41—is distributable as follows: to the State of Colorado, $10,598.18; to the County of Weld, $31,213.82; and the balance, amounting to $36,006.41, to thirteen cities and towns and fifty-two school districts, in various amounts as set forth in the exhibit. In making these collections, the treasurer acts as the agent of the county only in respect

to the county's distributive share of the taxes. In respect to each minor municipal corporation and the distributive share thereof, he acts as its agent *pro hac vice*. It is the duty of the county treasurer immediately upon receipt of the amount of the tax to distribute it in the foregoing manner, and immediately remit the proper share to each of the distributees.

The correctness of all of this is conceded by the court in the present opinion, except our contention that a separate action must be brought for the recovery of the taxes against each of the separate municipal entities. On this point the court holds that the statute of Colorado authorizes the recovery in a single suit against the board of county commissioners of all of the taxes, although the treasurer in collecting them did not act as the agent of the county or its board of commissioners, although the funds so collected neither actually nor constructively came into the possession or under the control of the county or its board of commissioners, and although said funds will have been all remitted to the various municipal entities by their agent and collector, the county treasurer, placed in their respective treasuries, and doubtless disbursed, before such a suit can be brought. The court remarks (217 Fed., 545) that "these difficulties are all of counsel's own creating." We respectfully submit, and have hereinbefore undertaken to demonstrate, that the court is wrong in its conclusion, and that it has assigned to the statute of Colorado a construction never placed thereon by the courts of the state. These considerations were advanced in good faith and supported by earnest argu-

ment in the original presentation of this case. Under such circumstances, we respectfully submit that the court's characterization of these contentions is undeserved.

We earnestly contend that the court is mistaken in its construction of this Colorado statute. The state courts may hold—indeed, have held—otherwise. We are convinced that they must, if the statute is to be held constitutional. If so, then the necessity of a multiplicity of suits to recover back the tax is obvious.

But there is another view to take of this matter. Plaintiff is under no obligation to pay this tax, because it is illegal and invalid. The statute of Colorado referred to imposes no such obligation, and would be unconstitutional if it did. Such statute at the most merely affords an opportunity to pay the tax, and sue to recover it back, if plaintiff should elect to pursue that course. But, as we have previously pointed out, plaintiff may, if it chooses, stand upon its rights and resist the collection of the tax, even though denied relief in equity. But the treasurer and the sheriff of Weld County, as statutory collectors of these taxes, have the right to collect them by process of distraint. This they threaten to do, and will do, unless prevented by injunction. Plaintiff's property in Weld County consists not only of its track and road-bed, but of the engines, cars, and other rolling-stock which pass thereover, and other personal property used in the performance of its public duties. These the treasurer and the sheriff will seize and distrain unless enjoined. All this plainly appears from the allegations of the bill and the answer. Such a course would necessarily be fol-

lowed by a multiplicity of suits. In every instance of seizure plaintiff, assuming the taxes to be invalid, would have its action at law of detinue or of replevin to reclaim the property, or of trespass for damages. Such process would be repeated indefinitely. It would interfere most seriously with the performance of plaintiff's public duties. It would subject it to repeated claims by its shippers and its passengers for delays in transit, and other inconvenience, damage, and consequent loss. All of this would be prevented if equity now retained jurisdiction and administered relief. But the court says (217 Fed., 545):

> "All these dangers as to multiplicity of suits were present in the case of Singer Sewing Machine Co. v. Benedict, 229 U. S. 481, and in Indiana Monufacturing Co. v. Koehne, 188 U. S. 681, and still the remedy provided by the statute was held to be plain, adequate and complete, so as to exclude a resort to equity."

Previously we have analyzed the foregoing decisions. In the Indiana case the statute and the state decisions made it clear beyond question that only one suit was required, and no independent ground of equity jurisdiction appeared. In the Colorado case the fact that it arose in, and related to, the peculiar consolidated municipal corporation known as the City and County of Denver made it clear that only one, at the most two, suits would be necessary. It has been said that one swallow does not make a summer. It is equally true that two suits do not make a multiplicity.

(f) *Equity alone can afford complete relief.*

But finally the court says (217 Fed., 545):

> "Finally, it is urged that the evidence has been taken and shows the taxes to be illegal, and plaintiff is therefore entitled to keep its money; that to compel it to pay the taxes and then bring an action to recover its money under the statute would not be as complete and speedy a remedy as a decree and injunction in this suit."

Thereupon the court proceeds to criticise this statement which it attributes to counsel. To the best of our recollection, we made no such statement, either in the briefs or in the oral argument, although we might properly have done so. The language and the thought thus criticised are the court's own, as set forth in its previous decisions.

> A. T. & S. F. Ry. Co. vs. Sullivan, 173 Fed., 456, 470.
>
> Wells, Fargo & Co. vs. Johnson, 214 Fed., 180, 189.

The language here criticised by the court is almost verbatim that which it employed in the Johnson case. It seems to us that these former decisions of the court enunciated sound doctrine. We believe that the language used and the thought expressed therein are not subject to just criticism. All of this is more fully discussed elsewhere. In any event, the court is not fair to itself when it criticises doctrines announced and expressions used in its former opin-

ions, upon the mistaken assumption that they emanate from counsel.

We therefore deduce the conclusion that in the case at bar equity jurisdiction was invoked upon several well-settled and well-supported grounds, such as existed and were recognized in 1789 as part of the jurisdiction of the High Court of Chancery of England. It follows that these grounds of equity jurisdiction were written into, and became a permanent part of, the statutes of the United States prescribing the jurisdiction of federal courts, the same as though they had been expressly transcribed therein. They have never since been changed by any act of Congress. The conclusion is, therefore, unavoidable that it is not only the privilege, but the duty, of a federal court of equity to entertain jurisdiction of a cause such as this, and that it may not renounce such jurisdiction, any more than a court of the United States may renounce its jurisdiction as a federal court of a case wherein diversity of citizenship exists and the necessary jurisdictional amount is involved.

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7. *The opinion of the Circuit Court of Appeals upon petition for rehearing* (222 Fed., 651), *does not meet, distinguish or avoid the principles and authorities hereinbefore discussed.*

In the original brief, in the oral argument, and in the brief supporting the petition for rehearing, the arguments and authorities set forth in the preceding pages were fully presented to the Circuit Court of Appeals. We have already sufficiently commented

upon the manner in which they were dealt with in the original opinion of the Circuit Court of Appeals.

In its opinion upon rehearing (222 Fed., 659), a majority of the court declined to modify the previous opinion. In the later opinion, however, the court undertook to distinguish or avoid some of the contentions which had again been earnestly pressed. With the utmost respect, we earnestly contend that in this undertaking the court was unsuccessful.

In response to the argument that no state-given remedy could limit or affect the equity jurisdiction of the Federal courts, and in an attempt to distinguish the numerous authorities cited in support of that contention, the Circuit Court of Appeals said (222 Fed., 654) that these decisions all referred to cases wherein the state law had provided a remedy enforceable only in the state courts, and from this apparently drew the conclusion that if the state law afforded a remedy which might be enforced in the Federal courts, such state-given remedy could and would have the effect to limit Federal equity jurisdiction. But in this, as we respectfully submit, the learned court below was in error. Many of the decisions cited in the preceding pages, and which had likewise been cited in the lower court, referred to cases wherein the enforcement of the state-given remedy was not at all confined to the state tribunals.

See:

United States v. Howland, 4 Wheat., 108, 114.

Ridings v. Johnson, 128 U. S., 212, 217.

Kirby v. Lake Shore &c. Railroad, 120 U. S., 130, 137.

Mississippi Mills v. Cohn, 150 U. S., 202.
Guffey v. Smith, 237 U. S., 101, 114.

In *McConihay v. Wright*, 121 U. S., 201, 206, the action of ejectment authorized by the West Virginia Code might apparently be brought in any court of competent jurisdiction.

The same thing is true of the decisions on the same subject which relate to controversies involving taxes. In *Cummings v. National Bank*, 101 U. S., 153, 156, 157, the Ohio statute involved apparently did not require that the action to recover back the taxes after payment should be brought in a state court.

In the Virginia Coupon Cases (114 U. S., 275), the statute involved expressly provided:

> "The person so paying such revenue may within thirty days after making such payment, and not longer thereafter, sue the said officer so collecting such revenue *in the court having jurisdiction of the parties and amounts.*" (Italics ours.)

Obviously no attempt was made to confine such suits to the state courts. Nevertheless jurisdiction in equity of the federal court was upheld and injunctive relief administered.

Allen v. Baltimore & Ohio, 114 U. S., 311.

The Tennessee statute (96 U. S., pages 71, 72), after authorizing payment of the disputed tax and suit to recover back, provides, in respect to said suit: "And the same may be tried in any court having the

jurisdiction of the amount and parties." By the terms of the statute, therefore, such a suit might be maintained in the federal court, if otherwise the necessary grounds of federal jurisdiction existed. Indeed, such an action at law, based upon said statute, has actually been maintained in the federal court in Tennessee, as is evidenced by decisions which the Circuit Court of Appeals in the case at bar (222 Fed., 658) itself cited:

Tamble v. Pullman Co., 207 Fed., 30.
Pullman Co. v. Tamble, 173 Fed., 200.

Moreover, even in those cases where the state statute which confers the right attempts expressly to confine its enforcement to the state courts, the law is well settled that where the necessary diversity of citizenship or other grounds of federal jurisdiction exist the action to enforce the state-given right may nevertheless be maintained in the federal court. The Circuit Court of Appeals for the Eighth Circuit, with the citation of abundant authorities, including many decisions of this court, has so held:

Brun v. Mann, 151 Fed., 145, 150, 151.
Harrison v. Remington Paper Co., 140 Fed., 385, 398, 399 (Certiorari denied, 199 U. S., 607).

We therefore respectfully submit that the learned court below was in error when it said that the principles for which we contend and the authorities which we have cited are applicable only when the state-given remedy is one the enforcement of which is confined to the state courts.

In its opinion upon the petition for rehearing (222 Fed., 654), the Circuit Court of Appeals holds —as it had held in its original opinion—that the statute of Colorado conferred a substantive right, and that while it was true that a state legislature could not, by a statute expressly directed to that end, restrict the equity jurisdiction of a federal court, yet it could accomplish the same result by legislation concerning substantive rights. But, as we respectfully submit, this holding is in conflict with the many decisions cited in the preceding pages hereof. While it is true that where a state statute grants a new right, such right will be enforced on the equity side of the federal courts if such right and its enforcement in that way are entirely consistent with the rules and principles of federal equity jurisprudence and within its jurisdiction as defined by the federal Constitution and statutes, yet it is equally true that a state-given right enforceable, if at all, only in an action at law does not and cannot limit, restrict or in any manner affect the equity jurisdiction of the federal courts.

Whitehead v. Shattuck, 138 U. S., 147.
Scott v. Neely, 140 U. S., 106.

See, also, the numerous authorities hereinbefore cited (*supra*, I, 3 and 4).

In support of its conclusion in this regard the Circuit Court of Appeals (222 Fed., 655, 656) cited *Brine v. Insurance Co.*, 96 U. S., 627, and *Missouri, Kansas and Texas Trust Co. v. Krumseig*, 77 Fed., 32; 172 U. S., 351. The question presented and decided in these cases was one altogether different from that which we are now considering. In the first case

the question was whether a statute of Illinois which gave to the mortgagor a statutory right of redemption after sale under decree of foreclosure was applicable to a decree of foreclosure entered in the federal court. In the second case the question was whether a statute of Minnesota which declared that all mortgages tainted with usury should be void, and should be so held, without payment of the debt with legal interest, instead of being merely voidable and to be canceled only upon repayment of the debt with interest, should be recognized and enforced by the federal court. In neither case did the state statute at all limit or restrict jurisdiction of the federal court of equity over any case or class of cases which otherwise it might have exercised. In both cases the state statutes established rules of property. For this reason alone, as is evident from the discussion in the opinions, it was held that the federal courts of equity should give them recognition.

The Circuit Court of Appeals in its opinion upon the petition for rehearing (222 Fed. 658) held that "when a statute like that of Colorado exists, complainant seeking to restrain the collection of a tax must do more than show some of the equitable circumstances which would support a resort to equity if there were no statute. He must make out a case of quite exceptional character," etc. With the utmost respect, we earnestly contend that the learned Circuit Court of Appeals is in error in this conclusion. A contrary rule seems to us to have been firmly established by the numerous decisions cited in the preceding pages. These hold, as we read them, that notwithstanding such a state statute, plaintiff need do no more than to show the existence of

one or more of the well settled and long recognized grounds of equity jurisdiction, such as relief from fraud or repeated trespass, removal or prevention of cloud upon the title to real estate, avoidance of a multiplicity of suits, or other like ground, a number of which plainly appear in the case at bar.

The Circuit Court of Appeals cites *Pullman Co. v. Tamble,* 173 Fed. 200, in explanation and support of its position. This case arose in Tennessee. A reading of the opinion demonstrates, we respectfully submit, that instead of sustaining the opinion of the learned court below it is to the opposite effect. It should be remembered that the Tennessee statute plainly provides an adequate remedy at law, enforceable in the Federal court, whereby the disputed taxes may be paid under protest, held in a separate fund, recovered in an action at law either in the state or Federal court, and prompt payment thereof made. In the case cited neither by allegation nor proof did any ground appear upon which equity jurisdiction could be invoked, even in the absence of such a statute. The court says (173 Fed. 203):

> "In order to give equity jurisdiction, and before the preventive remedy by injunction can be invoked, there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, would throw a cloud upon the complainant's title."

which is equivalent to holding that if any such ground had appeared equity jurisdiction would have been rightfully invoked, in spite of the Tennessee statute. The court then carefully demonstrated the absence in said case of each of said grounds of equity jurisdiction, which leads to the inevitable conclusion that if the court had found such grounds, or any thereof, existent in the case before it equity jurisdiction would have been retained. The federal court has definitely and conclusively so held in a case originating in Tennessee, and after full consideration of said Tennessee statute:

> Taylor vs. Louisville & Nashville R. R. Co. (C. C. A. 6th Cir.), 88 Fed. 350, 357, 358 (Certiorari denied, 172 U. S. 647).

The foregoing case expressly approved *Johnson v. Wells, Fargo & Co.*, 239 U. S. 234, 244.

II.

INVALIDITY OF THE DISPUTED TAXES.

1. *The Bill Stated a Cause of Action in Equity.*

The gravamen of the bill was unlawful discrimination in assessment, to the prejudice of the plaintiff, and resultant invalidity of that part of the tax against plaintiff's property arising from the illegal excess. The Constitution of Colorado (Art. X, sec. 3) provides:

> "All taxes shall be uniform upon the same class of subjects within the territorial

> limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal."

The constitutional command is that all property not expressly exempt shall be taxed, and that such taxes shall be uniform.

Statutes have been enacted pursuant to these constitutional provisions. Provisions are made for the yearly assessment and valuation of all of the property in the state, and by the application to the valuations or assessments thus made of the levies annually fixed by the state, county, city, town, school district, and other municipal authorities, taxes accrue for the various purposes mentioned.

But neither the assessments nor the levies are fixed by the same authority. The assessment of property of railroad companies and certain other public-service corporations is in the hands of the State Tax Commission, formerly the State Board of Equalization (Rev. Stat. 1908, sec. 5630; Session Laws 1911, p. 625, sec. 40). The assessment of all other property in the state is left in the hands of the county asssor in each county (Rev. Stat. 1908, secs. 5528-5547, 5572 et seq.). Elaborate provision is made, both in respect to the State Tax Commission and in respect to the county assessors, so that these assessing authorities may gain the most complete information regarding the nature, extent, and value of the property within their respective jurisdictions. The Constitution does not, but the statutes do, require all property to be assessed at its full cash value (Rev. Stat. 1908, sec.

5529, 5630); but for many years prior to the year 1913, when the practice was changed, it has been the constant custom and practice of the assessing authorities in Colorado, notwithstanding the statutes, to assess property at a fractional part of its true value. But this does not affect the situation with which we are dealing, if the assessed valuation for each class of property bears the same ratio to its actual value.

The dominant command of the Constitution is uniformity in taxation, and such uniformity must be maintained although the statutory direction as to full value be not observed.

First National Bank vs. Montrose County, 36 Colo., 265, 267, 268.

People vs. Pitcher (Colo. Sup.), 138 Pac., 509, 512.

Taylor vs. Louisville & Nashville R. Co. (C. C. A. 6th Cir.), 88 Fed., 350, 364, 365.

Not only are the assessments of different classes of property made by boards or officers wholly independent of one another, but the rates of levy, by application of which to the assessment so made taxes are to be produced, are fixed by different boards and officers, and are subject to different limitations. The levy for state purposes is fixed by the State Board of Equalization; the levies for county, city, town, school district, and other like purposes are fixed by the county commissioners, the city councils, the town trustees, the school boards, and the appropriate officers of other municipal subdivisions.

The levy for state purposes is by the Constitution limited to four mills upon the dollar (Colo.

Const., Art. X, sec. 11). The limitations upon the levies for county, city, town, school district, and other like purposes are much more elastic and liberal, so that, by increasing the levy within lawful limitations, ample revenue may be obtained for the purposes of such governmental subdivisions, although the assessed valuation be very low. As a consequence, it has been to the interest of the state government, whose officers have made the assessments of railroad and other like property, to make said assessments as high as circumstances would permit, so that the low rate of levy permitted by the State Constitution would produce as much revenue as possible and at the same time it has been to the interest of the counties and other smaller governmental subdivisions, whose assessors have assessed all property other than that within the jurisdiction of the State Board of Equalization, now the State Tax Commission, to assess said property at an exceedingly low valuation, because thereby the property of the inhabitants of said counties and other lesser subdivisions escaped a portion of the state tax when the four-mill levy came to be applied to these low local valuations, and because also thereby the property of non-resident public-service corporations, like railroad companies, assessed at a high rate by the state authorities, was compelled to bear not only a relatively undue burden of state taxation, but, by application of the high levies fixed by local authorities to the high assessments fixed by the state authorities, railroad and other like property has been compelled to bear a burden of the county, city, town, and school district taxation enormously out of proportion to that borne by property locally assessed.

Notwithstanding the constitutional command that there shall be uniformity in taxation, no effective method of procuring such uniformity has been provided until a very recent time, when the Colorado Tax Commission was created and endowed with important powers (Session Laws 1911, pp. 612-627). Although the statute creating this commission was enacted in 1911, the first commission was not appointed thereunder until May 20, 1912 (Rec., p. 233). And although this commission, as successor of the State Board of Equalization under section 40 of the act (Session Laws 1911, p. 625), in the year 1912 exercised its power of original assessment and assessed the property of railroad companies and certain other public-service corporations, yet it did not, owing to the lateness of its appointment and lack of time, attempt in the year 1912 to exercise or assert any of the other powers with which the statute endowed it, and in all other respects said statute remained unenforced until 1913.

In the fall of 1912 the plaintiff filed its petition with the State Tax Commission, seeking relief against the discrimination in assessments now complained of, and asking a hearing for that purpose; but no hearing was granted, and no action taken by the board (Rec., p. 214). Members of the commission testified in this case (p. 252) that the reason for this failure to enforce the new statute or to exercise the powers thereby conferred was that the commission had not "at that time been able to investigate all the counties in the state where there are railroads, and therefore we decided not to act on the complaint until we knew more about the situation." But in 1913, the year following the assessment which is here com-

plained of, the State Tax Commission began to enforce the new statute, and to perform the duties and exercise the powers thereby conferred. This, however, does not help the plaintiff in respect to the assessment for the year 1912. It is worthy of note that in the year 1913 the State Tax Commission required fifty-eight out of sixty-three counties in the state to raise the valuation fixed by the several assessors; that their power so to do under the new statute was fully affirmed by the Supreme Court of the state, and that, as seems probable, from and after the assessment of 1913, the abuses and discriminations theretofore prevalent will at least be less frequent, and some attempt will be made to enforce the constitutional command relating to uniformity in taxation. The matters recited above are matters of public history. They are fully set forth in a recent decision of the Supreme Court of Colorado, in which also the statutes relating to this matter are expounded, and their proper construction and legal effect determined.

People vs. Pitcher, 56 Colo., 343, 138 Pac., 509.

Until the year 1913, and the events which led to the decision in the Pitcher case, *supra*, there had not for many years been any equalization whatsoever between the assessment of railroad and other like property in the state by the state board and the assessments made each year upon all other property in the state by the county assessors. Each assessing authority had proceeded by itself, independently of the other. As a result, and in view of the conflicting motives and interests mentioned above, the consti-

tutional command of uniformity was persistently ignored, greatly to the prejudice of those whose property was assessed at the higher ratio.

Although different classes of property were assessed by different officers and boards, acting independently of one another, yet the entire assessment, when completed, must in law be regarded as one and as though made by a single authority. As said by Judge Taft in *Taylor vs. Louisville & Nashville*, 88 Fed., 350, 374:

> "The various boards, whose united action is in law intended to effect a uniform assessment on all classes of property, are to be regarded as one tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board which is an essential part of the taxing system intentionally, and therefore fraudulently, violates the law, by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at their full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully-assessed property. And this is true although the particular board assessing the complainant's property may have been wholly free from fault of fraud or intentional discrimination."

It follows that, whether the assessments by the county assessors were relatively too low or the assessments by the State Tax Commission relatively too high, the resultant discrimination is forbidden by the

Colorado Constitution. And if such unequal assessment be systematic, continuous, the result of intention, disregard of law, the application of an illegal principle of assessment, or other like dereliction of duty, the resultant tax is invalid as to the excessive portion, and he who suffers thereby is entitled to relief in the courts.

The bill in this case expressly avers that the property in Weld County subject to the jurisdiction of the county assessor was under-assessed by reason both of undervaluation and omission, and that said property was undervalued and taxable property omitted from assessment (p. 6) "deliberately, systematically and intentionally, * * * wrongfully and illegally;" that (p. 9) said omissions and said allowances of exemptions and said undervaluations were deliberately and systematically made and done, for the purpose and with the intent, and with the result unless the court prevent, of compelling plaintiff to pay a grossly high, unequal, and disproportionate share of taxes; and other allegations of similar import.

The bill also alleges (pp. 13-17) that by the statutory petitions the attention of the State Tax Commission and the State Board of Equalization was specifically directed to the fact that the assessment by the county assessor was disproportionately low or that by the State Tax Commission disproportionately high, and appropriate relief prayed; but hearing upon these petitions was denied and no relief afforded, although, as the members of the State Tax Commission now admit (pp. 238, 255), the illegal discrimination complained of actually existed and to the extent claimed, which fact they knew at the time

(pp. 256, 262), the failure to act upon the petitions, as Dr. Phillips says (p. 252), being due to lack of time "to investigate all the counties in the state where there are railroads." Thus it appears that, on the part of the State Tax Commission also, there was in the year 1912 intentional maintenance of a situation which produced unlawful discrimination, in the face of the actual knowledge that such discrimination would certainly arise from the relation of the assessments as made.

That such facts as these present an actionable wrong, from which the sufferer is entitled to relief in the courts, is now well settled. In *Atchison, Topeka & Santa Fe vs. Sullivan,* 173 Fed., 456, the court, upon consideration of the same constitutional and statutory provisions here involved, definitely announced the governing principle, speaking through His Honor, Judge Sanborn (p. 461):

> "A systematic and intentional under or over assessment of one or more classes of property, in violation of the law, whereby one or more classes of property is to be made to bear an undue proportion of the burden of taxation, presents a good cause of action for relief from the payment of the unjust part of the proposed tax." (Citing authorities.) " * * * (p. 471) Where there is a systematic, intentional, continuing omission or undervaluation of other taxable property by the taxing officers of a state or county, in violation of the constitution or law, which inevitably effects an unjust discrimination in taxation against the property of the complainant and against other property sim-

ilarly situated, a bill in equity will lie to enjoin the collection of that portion of the tax which resulted from the illegal discrimination." (Citing authorities.)

See, also:

Ritterbusch v. A. T. & S. F. Ry. Co. (C. C. A., 8th Cir.), 198 Fed., 46.

Wells, Fargo & Co. v. Johnson (C. C. A., 8th Cir.), 214 Fed., 180, 189.

Johnson v. Wells, Fargo & Co., 239 U. S., 234, 244.

Cummings v. National Bank, 101 U. S., 153, 157, 158.

National Bank v. Kimball, 103 U. S., 732, 733.

Poindexter v. Greenhow, 114 U. S., 270, 295.

Stanley v. Supervisors of Albany, 121 U. S., 535, 550, 551.

Railroad and Telephone Cos. v. Board of Equalization, 85 Fed., 302.

Nashville &c. R. R. Co. v. Taylor, 86 Fed., 168.

Taylor v. Louisville & Nashville (C. C. A., 6th Cir.), 88 Fed., 350 (Certiorari denied, 172 U. S., 647).

Southern Ry. Co. v. North Carolina Corporation Commission, 97 Fed., 513; 99 Fed., 162; 104 Fed., 700.

San Francisco National Bank v. Dodge, 197 U. S., 70, 75, 81, 108, 109, 110.

Chicago Union Traction Co. v. State Board of Equalization, 114 Fed., 557.

Raymond v. Chicago Union Traction Co., 207 U. S., 20.

Central R. R. of New Jersey v. Jersey City, 199 Fed., 237.

Jersey City v. Central R. R. of New Jersey (C. C. A., 3rd Cir.), 212 Fed. 76.

Louisville & Nashville R. R. Co. v. Bosworth, 209 Fed., 380, 452 et seq.

Louisville & Nashville R. R. Co. v. Bosworth, 230 Fed., 191, 211 et seq.

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2. *Plaintiff's property was fully assessed.*

The basis of this suit is discrimination. The Constitution requires uniformity. To secure such uniformity, the statutes provide for assessment at full cash value. But the command of the Constitution would be obeyed and uniformity as well secured if any other basis of assessment were adopted, provided only that all assessments were made upon the same basis.

A. T. & S. F. vs. Sullivan, 173 Fed., 456, 460.

Taylor vs. Louisville & Nashville, 88 Fed., 350, 364, 365.

First National Bank vs. Montrose County, 36 Colo., 265, 267, 268.

People vs. Pitcher, 56 Colo., 343; 138 Pac., 509, 512.

To secure such uniformity, the State Board of Equalization, and its successor, the State Tax Commission, had an agreement with the various county assessors, including the assessor of Weld County, that all property should be assessed at one-third of its full value. This agreement was in effect at the time of the assessment here complained of. It is so expressly alleged in the bill (pp. 4 and 5), admitted by the answer (p. 22), fully sustained by plaintiffs proof (pp. 33, 35-37), and expressly admitted by the county assessor (pp. 296, 297). The State Board of Equalization in 1909, and each year thereafter, and its successor, the State Tax Commission, complied with this agreement. Many of the counties did not. It is plaintiff's claim that Weld County was one of these. A. R. Fischer was the assessor of Weld County for four years. He made the assessment in that county for the years 1909, 1910, 1911, and 1912, the assessment for the latter year being the one involved in this suit. In 1909 a committee of the county assessors sat with the State Board of Equalization when the assessment of railroad and other like property was made. Mr. Fischer was a member of that committee. At the conclusion of the assessment, the committee, including Mr. Fischer, filed a written report with the State Board of Equalization highly commending the assessment and the methods by which it was reached, and stating, among other things: "The committee believe that the valuations you have fixed represent one-third of the actual value of the public service corporations of this state" (p. 37). Included in that assessment was the property of plaintiff. Mr. Fischer says (p. 296) that his opinion at that time

was that the Union Pacific assessment was one-third full cash value of the property. If that was true in 1909, it was equally true in 1912; for, without material change in conditions, the valuation had been constantly increased. In 1909 the assessed valuation of Union Pacific property in Colorado, upon the one-third basis, was $6,785,800; in 1910, $7,339,180; in 1911, $7,688,130; and in 1912, $7,688,130 (pp. 34, 41). In 1912 the State Tax Commission, acting under said agreement, which was still in full force and effect, made an assessment of the railroad property of the Union Pacific within the State of Colorado. The report of the Union Pacific, made to the board for that year, in accordance with the statute, is in evidence (Exhibit A, pp. 107-169). It is fully explained by the tax commissioner (pp. 202-209). The report itself was under oath, as the statute required it to be. The members of the State Tax Commission testified as to their assessment of the Union Pacific for 1912 (pp. 233, 234, 254, 263). Their method was first to determine the full cash value of the property of the Union Pacific within the State of Colorado, and thereafter, in fulfillment of their agreement with the county assessors, take one-third thereof as the assessable value. Each testified that they did not accept the report of the railroad company without investigation, but, on the contrary, made independent investigation and exercised independent judgment for the purpose of arriving at said full value, and each of them expressly testified (pp. 234, 254, 263) that thereby they arrived in that year at the full cash value of all of the property of the plaintiff within the state, and by the division mentioned obtained one-third of said full cash

value as the assessable value. This was their deliberate judgment, individually, collectively, and as assessing officers. These members of the commission were required to submit to an elaborate cross-examination by defendants with regard to the operation of their minds in valuing the railroad property. This was wholly improper.

C. B. & Q. vs. Babcock, 204 U. S., 585, 593.

In the absence of fraud on their part, either actual or constructive, in making the assessment, their judgment was conclusive. No such fraud was charged.

In *A. T. & S. F. vs. Sullivan*, 173 Fed., 456, 460, it was said, upon the facts there appearing, that, because the State Board of Equalization had admittedly not attempted or intended to assess railroad property at its full value, therefore no presumption could be indulged that said board had assessed said property at any particular percentage of its full value. But that principle is not applicable here. The object being to obtain uniformity in taxation, a formal agreement, participated in by all assessing boards and officers, that all property shall be assessed at one-third of its full value is the equivalent of a statute that all property shall be assessed at its full value. Such an agreement admittedly existed in the instant case. There was no such agreement in the Sullivan case, *supra*. Not only that, but the State Tax Commission, acting officially, in the instant case first determined the full value of the railroad property within the state. After making that determination, they divided the result by three, in accordance with the agreement. No such fact appeared in the Sullivan case. Moreover, in 1913, the year following that in

which the assessment here complained of was made, the agreement mentioned above did not prevail, and both the State Tax Commission and the county assessors undertook to assess all property at its full cash value, as the statute requires. The assessment by the commission in 1913, the commission then consisting of the same individuals who acted in 1912, was in the case of the Union Pacific almost exactly three times the assessable value found in 1912, when the agreement was that such assessable value should be one-third of the full cash value (pp. 234, 254, 263, 264). This assessment of 1913 furnishes an absolute check of the correctness of that of 1912. It was made in exact conformity with the statute requiring full valuation, and represents the deliberate judgment of the Tax Commission, after a full and complete investigation, which they describe in their testimony. It follows, therefore, that, while in the Sullivan case, *supra*, the plaintiff could not invoke the presumption in favor of the assessment by the State Board, in this case plaintiff is certainly entitled to the benefit of such presumption. Under the circumstances of this case, it must be conclusively presumed that the finding and assessment of the State Tax Commission in the year 1913 represented the full value, and in the year 1912 one-third of such full value, of the property of the Union Pacific Railroad Company in the State of Colorado.

Pittsburg, C. C. & St. L. Ry. Co. vs. Backus, 154 U. S., 421, 435, 436.

Adams Exp. Co. vs. Ohio State Auditor, 165 U. S., 194.

There is further and absolute proof that the

property of plaintiff was not underassessed in 1912. The assessable value per mile found in that year was $13,183, being one-third of $39,549. The net earnings per mile in that year were $2,477.12. This included all earnings in Colorado, both state and interstate, and amounted to only about 6¼ per cent on the full valuation as found by the State Tax Commission. It is unnecessary to say that this is a very low rate of return. It emphasizes the fact that the property valuation with respect to which it is computed must have been relatively high. It forbids the assumption that such valuation was less than the actual value.

As a consequence, we respectfully submit that this part of plaintiff's case was established beyond reasonable doubt. In the face of such proof, it cannot be successfully urged that the assessable value found by the Tax Commission in 1912 was less than 33⅓ per cent of the full actual value of plaintiff's property. To say the least, the fact that plaintiff's property was fully assessed was sufficiently established for all purposes of the preliminary hearing.

Indeed, it is not seriously questioned that the assessment of plaintiff's property made by the State Tax Commission in 1912 represented at least one-third of the full value of all of plaintiff's property which was within the State of Colorado. The real contention was that the statutes of the State of Colorado pertaining to such matters—particularly a statute referred to in the evidence as section 106 of the Revenue Act, but which appears in the Revised Statutes of 1908 as section 5653—required the application of a rigid rule of apportionment, without regard to whether the result thus obtained did or did not represent the value of the railroad company's property

within the state. The precise contention was that, in assessing the property of railroad companies whose lines extended outside of the State of Colorado, it was the duty of the State Tax Commission to determine the value of the entire plant, wherever situate, and then to take as Colorado's assessable portion thereof a part of the entire value of the plant which should bear the same ratio to such entire value as the mileage in Colorado bore to the total mileage, without the exercise by the commission of any judgment whatsoever as to whether the result thus reached did or did not represent, in the opinion of the commission, the actual value of that portion of the plant situate within the state. Defendants say that, instead of applying this rigid rule, the State Tax Commission and its members took the liberty of exercising their judgment and reaching a determination based upon various elements and considerations as to what was the actual value of that portion of plaintiff's property, both tangible and intangible, having its situs within the state. This, in reality, is the sole complaint which defendants make concerning the assessment of plaintiff's property. The contention is fundamentally unsound. Colorado could not, without violating well-known constitutional principles, require the application of any such rigid rule. As a matter of fact, it never attempted to do so, either by its Constitution or by its statutes. The Constitution (Art. X, sec. 3) requires that taxes shall be levied upon property "within the territorial limits of the authority levying the tax." The statutes relating to the assessment of railroad property provide in substance as follows (all references are to the Revised Statutes of 1908):

Section 5591:

"Except as herein otherwise provided in determining the value of taxable property in this state, of corporations, foreign and domestic, the value of the capital stock and bonds of each corporation shall be received and considered, and shall be competent evidence of the value of the entire plant of such corporation, but any and all other evidence of the full and true cash value of said property, both tangible and intangible, shall be received and considered in arriving at the value of the entire plant of such corporation. * * * This section shall control the state board of equalization (now the state tax commission) as well as the county assessors. Where corporate property is so assessed as a unit, except where otherwise specially provided for in this act, the value of its real estate in this state, and the value of its property beyond the limits of this state, not used in the operation of its main business, if any, shall be deducted, and such realty in this state, shall be assessed by the assessors in every respect as though owned by individuals or natural persons."

Section 5630:

"It shall be the duty of the said board (state board of equalization, now the state tax commission) to assess at the full cash value of *all the property, tangible and intangible, in this state*, used or controlled by

railway companies, telegraph, telephone, palace car, sleeping car, fast freight and express companies; provided, however, that real estate and improvements thereon owned by any railroad company and not used for the convenient and proper operation of its railways shall not be included in such assessments, but such real estate and improvements thereon shall be assessed by the proper county assessor in the same manner as other real estate and improvements in the county where the same are situated."

Section 5642 requires a sworn statement to be filed each year by the railway company with the State Tax Commission, giving complete information with respect to its property within the state, the details of which need not be set forth at length. It is sufficient to say that the evident purpose of this sworn statement is to furnish facts for the consideration of the Tax Commission in arriving at the value of the property within the state.

Section 5653 (which is the section relied upon by the defendants):

"In case of railway, telegraph and telephone companies, whether part or all of the corporate plant or profit-producing unit is situate within this state, the state board of equalization (now the state tax commission) shall (1) determine the true value of the entire corporate plant wherever situate, *and in the manner heretofore set down in this act;* and (2) the board shall then ascertain and determine the total number of miles of rail-

way track, telephone, or telegraph lines, of said company wherever situate; and (3) the total of such mileage in this state. This state shall be entitled to that proportion of the total value of any such plant so ascertained for the purposes of assessment and taxation, that the mileage of any such company in this state bears to its total mileage wherever situate, and the state board of equalization (tax commission) shall assess the same accordingly. * * * Provided, that the state board of equalization in assessing the property of corporations whose lines and property extend into other states or territories, shall have power to make such deductions of property of such corporation in other states or territories not connected directly with the operation of the corporate business, as may be just, *to the end that the fair proportion of such corporate property in this state may be ascertained.*"

We submit that the foregoing sections, construed together, as they must be, were not intended to, and do not, have the meaning contended for by defendants. From the Constitution and the statutes it is evident that the purpose was to arrive at the value of the property of railway companies, and other like corporations, which had its situs within the borders of the state. The language employed, especially the words italicized above, plainly indicates that it was certainly the intention that the assessing board should exercise its judgment and authority in determining the value of the property within the state. As an in-

cident to this process, and as an element which might rightly be considered, such assessing board was authorized to ascertain the unit value of the entire property, wherever situate, and Colorado's proportion thereof upon a mileage basis. But this was not to be an absolute and unbending measure. It was not the intention to substitute mathematics for deliberate judgment. It is obvious that in many instances the property of an interstate railroad company situate in one state is materially greater or less in value than its property situate in another. Wherever this is true, the application of the rigid unit rule and mileage apportionment necessarily results in the importation into the state, where the property is of less value, of values attaching to property having its situs in other states. This is forbidden by the fundamental law, and a statute which requires it is unconstitutional. The Supreme Court of the United States has been able to sustain state statutes providing for the unit rule of assessment and apportionment upon a mileage basis only in those cases where the statute did not require that the valuation of the property within the state should be absolutely determined upon a mileage basis, but made that only one of the elements from which, taken with other facts, circumstances, and conclusions, the assessing board might determine the value of the property within its jurisdiction, and in some cases has strained the language of the statute to make it so read.

Pittsburg etc. Ry. Co. vs. Backus, 154 U. S., 421, 427, 430, 431, 434.

Fargo vs. Hart, 193 U. S., 490, 499, 500.

D. L. & W. Ry. Co. vs. Pennsylvania, 198 U. S., 341, 356.

Union Refrigerator Transit Co. vs. Kentucky, 199 U. S., 194.

Western Union Tel. Co. vs. Kansas, 216 U. S., 1.

Louisville etc. Ferry Co. vs. Kentucky, 188 U. S., 385, 396.

Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., 196.

Cleveland etc. R. Co. vs. Pennsylvania, 15 Wall., 300.

In *Pittsburg etc. Ry. Co. vs. Backus, supra,* the Supreme Court expressly recognizes that there may be cases to which the unit rule and distribution upon a mileage basis cannot be applied without producing unjust and unconstitutional results, and holds that a statute requiring it would be invalid; saying (p. 431):

> "It is true there may be exceptional cases, and the testimony offered on the trial of this case in the Circuit Court tends to show that this plaintiff's road is one of such exceptional cases, as, for instances, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or where in certain localities the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock."

And in *Fargo vs. Hart, supra,* the court says (p. 449):

> "It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, under the name of enhanced value, or good will, if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value a division by mileage is justifiable. But it is recognized in the cases that if for instance a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile. That would be taxing property outside of the state under a pretense."

In *D. L. & W. Ry. Co. vs. Pennsylvania, supra,* the court held, as stated in the syllabus:

> "The collection of a tax on a corporation on its capital stock, based on a valuation which includes property situated out of the state, would amount to the taking of property without due process of law, and can be restrained by the federal courts."

And in *Western Union Tel. Co. vs. Kansas, supra,* the court emphasizes the necessity that a state tax against a corporation must "depend in fact on the value of its property situated within the state" (p. 27).

> (P. 37) "To hold otherwise is to allow form to control substance. It is easy to be seen that if every state should pass a statute similar to that enacted by Kansas, not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified, and the business of the country thrown into confusion, but each state would continue to meet its own local expenses not only by exactions that directly burden such commerce, but by taxation upon property situated beyond its limits."

It follows that, if the Colorado statute required the construction contended for by defendants, it would be rendered unconstitutional and invalid. In such a case an imperative rule requires that the language be given the opposite construction. In so doing the courts—

> "may disregard the natural and usual import of the words used if it is possible to adopt another construction, sustaining the statute, which shall not be strained or fantastic. In so doing they construe the act in accordance with the presumed intention of the legislature. For the law-making body is always presumed to have acted within the scope of its powers."
>
> Black's Constitutional Law (2d ed.), p. 60, sec. 37.
>
> Miller vs. United States, 11 Wall., 268, 309.

United States vs. Coombs, 12 Pet., 72.

Grenada County Supervisors vs. Brogden, 112 U. S., 261, 268.

Chesapeake etc. R. Co. vs. Kentucky, 179 U. S., 388, 394.

Japanese Immigrant Case, 189 U. S., 86, 101.

To bring into operation this canon of construction, it is wholly unnecessary for the court actually to determine that the statute, if given the other construction, would be unconstitutional. The rule, as expressed by this court, is that—

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter."

United States vs. Delaware and Hudson Co., 213 U. S., 366, 408.

Harriman vs. Interstate Commerce Commission, 211 U. S., 407.

Union Pacific vs. Laramie Stockyards, 231 U. S., 190, 200.

We therefore submit that, by the proper and only permissible construction of the Colorado statute, the State Tax Commission was not absolutely required in every case to apply the rigid unit rule and mileage proportion basis to ascertain the amount which should stand as the assessable value of plaintiff's property in Colorado. On the contrary, the Tax Commission was

left free to consider this with other elements, to make proper allowances and deductions in case it should appear that exceptional values existed in respect to those parts of the line situate in other states, and by the exercise of judgment, based upon all of these considerations, to determine what was in reality the value of that portion of the property situate within the state. The statute in question was enacted in 1902. Ever since its enactment the successive Boards of Equalization, the Tax Commission, and the other officers charged with carrying its provisions into effect have at all times given it the construction mentioned above, and acted accordingly in making assessments (Record, pp. 296, 297). Such a contemporaneous and continuous practical construction by the officers charged with its administration is, in case of doubt, entitled to great weight.

> Deming vs. McClaughry (C. C. A., 8th Cir.), 113 Fed., 639.
>
> Fairbank vs. United States, 181 U. S., 283, 308-311.

Moreover, the Circuit Court of Appeals has heretofore so construed the statute in question. In *A. T. & S. F. vs. Sullivan*, 173 Fed., 456, the eighth syllabus (prepared by the court) was:

> "Evidence of the value of property not necessary for railroad purposes, and that parts of the corporate plant of a railroad company, including its various terminals, are of exceptional value, is competent, and when offered must be given effect by the taxing

> board and by the court in ascertaining the value of its corporate plant in the state."

And the opinion, which deals with the very same provisions of the Colorado statute here under consideration, fully bears out the syllabus.

It was, therefore, the privilege and the duty of the State Tax Commission, in determining the value of that portion of the plant situate within the State of Colorado, to consider and make due allowances for exceptional values attaching to those parts of the plant situate elsewhere. But in the case at bar specific showing was made to the State Tax Commission that such exceptional foreign values existed, and the commission was urged to make allowance therefor in its assessment. The statutory statement filed by plaintiff with the commission expressly makes claim therefor (Record, p. 107). These claims were pressed before the commission (p. 216), and it must be conclusively presumed that the commission gave due consideration and weight to these matters in arriving at its assessment. As was said by the Supreme Court in *Pittsburg etc. Ry. Co. vs. Backus*, 154 U. S., 421, after commenting upon the necessity in applying the unit rule of making due allowance for exceptional values outside the state (p. 431):

> "If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the state, took into account the peculiar and large value of such facilities and such extra

rolling stock. * * * (P. 435) The certificate of the state board does not show that it reached its determination of the value of the property in Indiana by first ascertaining the total value of the company's property and then dividing it on the mileage basis. It simply shows that it considered the matters which by the statute were required to be presented to it by the railroad company, as well as all other matters which in its judgment bore upon the question of value, and from such consideration reached the result announced, to-wit, the value of that part of the company's road in the state of Indiana. Evidence that there were peculiar matters which gave to portions of the road outside of Indiana an enormous value as compared with the general line of the road does not prove that the board did not take those peculiar matters into consideration. On the contrary, the reasonable presumption is that if its attention was called by the company to those facts it did take them into consideration in connection with the information derived from the total amount of stock and indebtedness of the company."

But in the case at bar the members of the commission testified expressly that they did not construe the statute as requiring them rigidly to apply the unit rule and mileage proportion basis; that they used this element only as one matter to be considered in forming their judgment as to value; and that, if they had applied the rigid rule now contended for by

defendants, the result would certainly have been a valuation upon Union Pacific property within said state greater, in the judgment of the commission, than its actual value; and this would have occurred because, by the application of the rigid rule, values would have been imported into the state for purposes of taxation which had their situs elsewhere (Record, pp. 234, 254, 257, 258, 259, 262, 263, 264).

We therefore feel authorized to conclude that the assessable valuation fixed by the State Tax Commission was at least 33 1/3 per cent of the actual value of all of the property of the Union Pacific Railroad Company having its situs within the State of Colorado.

But the Colorado statute further provides (Rev. Stat. 1908, sec. 5656) that, after the State Tax Commission has thus ascertained the assessable value of the entire property within the state, it is its duty, without the exercise of any judgment, to distribute to each county in the state, strictly upon a mileage basis, the valuation so ascertained. The language of the statute is:

> "Each county shall be entitled for purposes of taxation, and shall tax, a share and part of the total value of the properties of each railway company, telegraph and telephone company, which shall be to the whole value of the properties of such corporation, as the number of miles of the railway or line of telegraph or telephone wire operated by such corporation within the state bears to the number of miles in such county."

This statute was strictly followed. The value certified to each county pursuant to its terms did not, in the judgment of the board, represent the actual value in said county. The commission made no effort to determine the value of railroad property by counties. The members of the commission so testified (p. 234). But if that part of the road in Weld County was worth less per mile than the average mileage in the state, it is obvious that by this method Weld County received for purposes of taxation an amount which represented more than one-third of the actual value of Union Pacific property within said county. That such was actually the case is shown without dispute (Record, p. 211), and the county assessor himself so testified (pp. 308, 309). It follows, therefore, that Weld County actually received for purposes of taxation an assessed valuation equal to more than one-third of the actual value of Union Pacific property situate in that county. And if the assessor of Weld County, in violation of his agreement with the State Tax Commission, actually assessed property subject to his jurisdiction at not to exceed one-fifth of its value, the resultant discrimination far more than justified the complaint which is now made.

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3. *The discrimination complained of actually existed.*

The limitations of this brief will not, of course, permit a complete analysis of the proof by which such discrimination was shown. Although issue was taken upon the fact of discrimination, plaintiff had in mind the rule which controlled upon application for the

preliminary injunction. It sought only to make a sufficient showing to indicate that the contention was a serious one and worthy of investigation.

As shown by the abstract of assessment for 1912, the total net assessment by the assessor was $15,421,-210. (Rec., p. 172). Defendants contend that this was 33 1/3 per cent of the actual value of all the property in Weld County subject to the assessor's jurisdiction. The plaintiff contends that it did not exceed 20 per cent of such actual value. The difference between these two contentions measures the extent of the discrimination claimed by plaintiff. If plaintiff is correct in its contention, the actual value is five times the amount of the assessment—to-wit, $77,106,050. If defendants are correct, the actual value is three times the assessment—to-wit, $46,263,-630. Deducting the smaller from the larger figure, the total amount of discrimination claimed, expressed in terms of actual value, is $30,842,420. If, therefore, plaintiff is able to show that, by undervaluations and by omissions from assessment, either of items of property or of elements of value, property or values to that amount escaped assessment in Weld County in 1912, its case is made.

Weld County is one of the richest agricultural counties in the State of Colorado. Its population, according to the census of 1910, was 39,177. There lie within its border several large towns, including the city of Greeley with a population of approximately 10,000. It was the pioneer in irrigation, has taken and maintained the lead in that development, and its lands are highly cultivated.

The Colorado statutes require that each year the county assessor shall file an abstract of his assess-

ment with certain state officers. Originally this filing was with the State Auditor, but now it is made with the State Tax Commission. Such abstracts must be under oath. (Rev. Stat. 1908, secs. 5628, 5659, 5660; Session Laws, 1911, p. 622, sec. 30.) For purposes of comparison, and in order to show systematic and continuous underassessment, plaintiff introduced in evidence certified copies of these abstracts of assessment made by the assessor of Weld County for the years 1910, 1911, and 1912, the assessment of the latter year being the one involved in the present suit. (P. R., pp. 175, 178, 170.)

The principal wealth of the county is in its agricultural and grazing lands, and the improvements thereon. According to the assessment for the year 1912, the assessed valuation of these items of property aggregated $9,364,320, out of a total net assessment by the assessor of $15,421,210; constituting, therefore, approximately three-fifths of all the property locally assessed. Plaintiff, therefore, gave special attention in the proof to this large item, but other items of property were not neglected in the showing.

Fortunately for the plaintiff, a federal census was taken in 1910. As the court is aware, we have now a permanent census bureau, the records of which are public archives, and the census of 1910 was conducted by it. The statute providing therefor will be found in 36 Statutes at Large, pages 7 et seq., and the eighth section thereof, as amended, in 36 Statutes at Large, page 227. (See also Fed. Stat. Ann., 1909 Supp., pp. 715 et seq.; 1912 Supp., Vol. 1, pp. 29 and 30.) This act (sec. 1) required that, in addition to statistics of population, the census should embrace

"agriculture, manufactures, and mines and quarries." It provided (sec. 8, as amended): "The schedules relating to agriculture shall include * * * tenure, acreage of farm, acreage of land under irrigation * * * value of farm and improvements, value of farm implements, number and value of live stock on farms and ranges, number and value of domestic animals not on farms and ranges * * *." Specific and detailed directions were given to the enumerators as to their method of procedure in obtaining the facts required by the census, the most searching investigation being required to ascertain the facts with exactness, the information to be obtained "as of date April 15th of the year in which the enumerations shall be made" (sec. 12). Liberal provision was made for the compensation of the enumerators (sec. 16). They were required to take an oath (sec. 19); and by section 23 severe penalties were provided for any refusal to answer, or for the giving of false answers or other willful failure to furnish such enumerators with full, complete, and truthful information concerning the matters which they were investigating.

The statistics thus gathered are public records. They are the result of official investigation, conducted according to law, by officers duly authorized and specially selected for the purpose. The result of such investigation and official determination possesses an evidential character which is very persuasive. These statistical results are facts established by or in pursuance of law, which the court is required judicially to know.

1 Chamberlayne on Modern Law of Evidence, secs. 730, 731.

It was, therefore, unnecessary to introduce the report of the census in evidence, but, to avoid question, the parties stipulated (Rec., p. 184) that the official report of the census, including the supplement for Colorado, might be deemed to be in evidence, and read and considered both in the trial court and in this court on appeal. For the convenience of the court, a copy thereof, in the form of the volume issued by the Government Printing Office, under the authority of the Department of Commerce and Labor, has been deposited with the clerk.

As stated above, the census speaks as of April 15, 1910. The county assessment for that year (Rec., p. 175) was required by statute to be made as of April 1, 1910. Inasmuch as the enumeration and valuation by the assessor and that by the officers of the census occurred on almost the same day, comparisons between the two are exceedingly instructive. Wherever they differ, we submit that the results attained by the census enumerators, who were highly paid and sworn officers of the United States and in the performance of official duties, are entitled to at least as much consideration—should carry at least as much weight and be supported by at least as strong a presumption of correctness—as the results achieved by the county assessor. In litigation similar to this, such census reports have been regarded as most persuasive evidence.

> Louisville & Nashville vs. Bosworth, 209 Fed., 380, 460.

While the county assessment for 1910 is not directly complained of herein, yet it varies in no important particular from that of 1911 and that of 1912.

Consequently, comparisons of the census with the assessment for 1910, and comparisons of the latter with those for 1911 and 1912, seem to us to be extremely important.

(a) *Lands, other than town and city lots.*

As stated above, lands other than town and city lots constitute three-fifths of the values in Weld County locally assessable; consequently, the plaintiff in its showing paid particular attention thereto. The statute requires that "in determining the true value of assessable property, except as otherwise provided in this act, *the market value shall be the guide.*" (Rev. Stat. 1908, sec. 5591.) This rule was applicable to that class of property now under consideration. To determine the real market value, it was necessary to determine what the lands were selling for. For this purpose plaintiff caused to be examined and listed all of the warranty deeds conveying lands recorded in said county between January 1, 1909, and June 1, 1913. Two such lists are presented: one, covering the period from January 1, 1909, to August 23, 1910, is verified by the affidavit of George G. Holcomb, who examined the records of the county and prepared the list (Rec., pp. 76-95); the other, verified by the affidavit of Arthur H. Scribner, covers the period from September 1, 1910, to June 1, 1913 (Rec., pp. 51-63). These lists contain as to each transaction the description of the land conveyed and the consideration paid therefor, as stated in the deed. They include all warranty deeds recorded in the county during the period mentioned which conveyed lands, except those where it appeared upon the face of the deed that the consideration was fictitiously stated, such as transactions

involving trades, or where the deed obviously failed to recite the actual consideration, or recited a consideration of one dollar or other similar fictitious amount, or recited love and affection as the consideration. These and these only were omitted from the lists. All others were included. The lists which are set forth in this record cover more than a thousand transactions. The lands conveyed are scattered at random throughout the length and breadth of the county.

The period covered by these lists includes the year 1912, for which the assessment here complained of was made, as well as considerable time both prior and subsequent to said year. The list covering the period from January 1, 1909, to August 23, 1910 (pp. 78-95), shows after each item the assessed valuation for 1910, and also the assessed valuation for 1912. Compared with the considerations paid, these valuations are ridiculously low. The total of the considerations paid in the transactions described in said list was the sum of $4,004,867; the total of the assessed valuation for 1910 was $609,100, or 15.21 per cent; the total of the assessed valuation for 1912 was $651,351, or 16.26 per cent.

In the list of these transactions covering the period from September 1, 1910, to June 1, 1913 (pp. 53-63), the assessed valuation for the year 1912 is set after the description of each transaction. Compared with the consideration paid in each instance, these assessments are ridiculously low. The total of the considerations paid in the land sales during this period was $3,443,889, while the total assessed valuation of all of said property for the year 1912 was $512,519;

a percentage of assessed valuation to actual market value of 14.88 per cent.

Consolidating the two lists, they cover transactions involving a total of considerations paid of $7,448,756. The assessed valuation upon the same property for the year 1912 was $1,163,870; from which it appears that the average ratio of assessed valuation of said lands to the actual market value thereof is 15.62 per cent (Rec., p. 52).

We submit that this is a remarkable showing. No better evidence could possibly be obtained as to the relation between the market value of these lands, which was the statutory standard of assessment, and the assessed value; and from this showing it conclusively appeared that the habitual, continuous practice of the assessor was to value the lands in this county at much less than one-fifth of their actual market value.

The truth of the recitals in these deeds regarding considerations paid, and the reliability of the conclusions to be drawn therefrom, are plainly exhibited in various ways. Mr. Holcomb interviewed a large number of persons having actual knowledge of the transactions evidenced by these deeds (Rec., pp. 95, 273, 274). The deeds so verified were taken at random from the list. With one exception, the actual considerations paid were those stated in the deeds; the exception being a case where the sum paid had been $7,200, instead of $7,400 as stated in the deed.

A right-of-way agent of the railroad company, who by the purchase of right-of-way in Weld County had become familiar with the market value of lands adjoining, or in the vicinity of, the right-of-way, gave a list of said lands, with the values (pp. 45-47). The

assessed valuation of each parcel appears opposite the description thereof. Compared with the actual market value, these assessments are ridiculously low. The total market value of the lands described was $1,162,445; the total assessed value was $155,205, or an average percentage of assessed valuation to actual market value of 13.25 per cent.

Real estate dealers in Weld County presented affidavits (pp. 47 and 48) as to the market value of the lands in their vicinity shown by actual sales. The percentage of assessed value to actual market value was much less than 20 per cent (Rec., pp. 275, 276).

The State Land Appraiser furnished a comprehensive affidavit (pp. 65-75) relating to sales of state lands and the appraisement thereof for sale during the period covered by the affidavit. Numerous tracts of land are thus described. Without any exception, the market value thereof was more than five times as great as the assessed valuation, and in many instances the discrepancy was much larger.

The State Tax Commission caused an independent investigation to be made on its behalf by its former secretary, Mr. Fairall. This investigation and its result are described by Mr. Fairall (pp. 265-268) and one of the commissioners, Mr. Link (p. 255). All of the sales of lands from August, 1912, to July, 1913, were examined, and it was found that the assessed valuation for 1912 ranged from 17 to 19 per cent of the actual market value.

Immense areas of land, like the Greeley-Poudre Irrigation District, were flagrantly underassessed. Mr. Camfield, who was completely informed upon this subject, because of his connection with the district

and its affairs, testified (p. 242) that the Greeley-Poudre District embraced 90,000 acres of land held in private ownership and subject to assessment, which acreage was in addition to the 300,000 acres of irrigated land to which he had previously testified. He further stated that in 1912 these 90,000 acres of land had an average net market value of $30 an acre. They were, however, assessed (p. 274) at an average rate per acre of $3.34. The secretary of the district, a witness for defendants, testified that the sale price of these lands averaged not less than $18 per acre (p. 384), and that in the year 1912 the sales of lands in said district which he made were at the rate of about $20 per acre. Mr. Bliss, county attorney, and Mr. Tew, who are counsel for defendants herein (p. 369), purchased land in said district at $20 an acre, and sold it at $22 an acre. The very land which the secretary of the district sold in 1912 for $1,500 was assessed in that year at $210; that which he sold in 1912 for $3,800 was assessed at $950 (p. 394); and the land which Mr. Tew and Mr. Bliss, counsel in this case, bought at $20 an acre and sold at $22 an acre was assessed in 1910, and again in 1912, at the rate of $2 per acre (p. 395).

There was other proof, absolutely conclusive in its character, that in 1912 the assessment of farm lands and improvements was less than 20 per cent of the market value. This came from the camp of the enemy, from witnesses not called by us, and in respect of lands scattered throughout the county, which we did not select as illustrations. Most of the defendants' witnesses were officers or former officers of the county. Without any exception, when upon cross-examination it was ascertained that they were owners

of land, as most of them were, and were required to give what in their opinion was the market value of their land, a comparison with the assessment for 1912 showed that these market values were at least five times, and in several instances more than five times, as great as the assessed valuation in 1912. Illustrations will be found in the testimony of Wylie, deputy assessor (pp. 320, 393); Decker, deputy assessor (pp. 327, 393, 394); Ireland, former deputy assessor (pp. 378, 395); Levis, county commissioner, who testified that his own farm, with improvements, was worth nearly $23,000, although it was assessed at $3,610 in the year 1912, as he knew (pp. 352, 394); and Hodgson, the other county commissioner, who, it appears, is a large landowner, and who said (pp. 356, 394) that his home place was worth $26,000, although it was assessed in 1912 at $3,530, and that another piece of property which he owned and sold for $12,080 was assessed in 1912 at $2,220. Such instances in the testimony of defendants might be multiplied; for it invariably appeared upon cross-examination that the witness' own land, or that about which he had personal knowledge, was assessed at not to exceed one-fifth of its market value.

The accuracy of the conclusion is fully supported by the evidence of the United States census. Comparing the values of lands as shown by the census with the assessed valuations for the years 1910, 1911, and 1912, respectively, it appears that the percentage of assessment to actual value was, in the year 1910, 16.47 per cent; in the year 1911, 16.67 per cent, and in 1912, 17.13 per cent. The following table shows this in detail:

TABLE 1.

Statement Showing Land Assessments in Weld County, Colorado, for Years 1910, 1911, and 1912, and Comparison with Actual Value of the Same as Shown by U. S. Census of 1910, page 635.

Land in farms as per census, acres..... 914,220
Value of same as per census.....$45,117,628
Average value per acre, $49.23.

Assessed for year 1910 (Rec., p. 175).

	Acres	Valuation
Irrigated land	249,135	$5,317,920
Natural hay land	12,040	190,240
Dry-farming land	31,412	154,290
Grazing land	898,303	
Less grazing land not in farms	276,670	
	621,633	1,749,060

Total assessed valuation.....$7,411,510

Per cent of assessment to value, 16.47 per cent.

Assessed for year 1911 (Rec., p. 178).

	Acres	Valuation
Irrigated land	255,169	$5,341,760
Natural hay land	12,099	191,320
Dry-farming land	19,841	98,620
Grazing land	950,551	
Less grazing land not in farms	323,440	
	627,111	1,868,720
Total assessed valuation		$7,500,420

Per cent of assessment to value, 16.67 per cent.

Assessed for year 1912 (Rec., p. 170).

	Acres	Valuation
Irrigated land	266,871	$5,572,310
Natural hay land	13,024	198,120
Dry-farming land	21,407	102,480
Grazing	964,302	
Less grazing land not in farms	351,384	
	612,918	1,836,846
Total assessed valuation		$7,709,756

Per cent of assessment to value, 17.13 per cent.

The conclusion is irresistible that lands were in the year 1912, and had been continuously for at least two years prior to that time, assessed at less than one-fifth of their actual market value. In 1912 the

aggregate assessed valuation of agricultural and grazing lands, and the improvements thereon, was $9,364,320. Defendants assert that this was one-third of the actual value, in which event the actual value would have been $28,092,960. The proof shows beyond question that the assessed value was certainly no more than one-fifth of the actual value, making such actual value $46,821,600; so that the undervaluation upon such lands and improvements as were assessed at all, expressed in terms of actual value, was $18,727,640. But much land properly assessable was wholly omitted from assessment. This is especially true as to the irrigated land, which, of course, has the highest value. The acreage of irrigated land assessed in 1912 (p. 170) was 266,871. Mr. Camfield, a resident of Greeley—a farmer, a banker, and a builder of irrigation works, and a man thoroughly familiar with the subjects concerning which he assumed to testify—said that the acreage of such land in 1912 was 300,000 acres (p. 242). If this be true, the assessor had failed to assess over 33,000 acres of irrigated land. The census (Census Report, p. 664) showed the acreage irrigated in 1909 to be 395,514 acres. The acreage assessed was, in 1910, 249,135 (p. 175); in 1911, 255,169 (p. 178), and in 1912, 266,871 (p. 170). According to the census, over 100,000 acres of irrigated land escaped assessment in each of those years.

Mr. Camfield stated that this land was worth $100 an acre. It was assessed in 1912 at the rate of $21 an acre. Assuming that this assessment was upon a one-third basis, its value was certainly not less than $60 an acre. At this rate the irrigated land omitted from assessment in 1912, according to the census figures, was of an actual value of about $6,000,000.

There is still another comparison to be made with the census. According to the census report (p. 613), what is there classified as "improved land in farms" includes "all land regularly tilled or mowed, land pastured and cropped in rotation, land lying fallow, land in gardens, orchards, vineyards and nurseries, and land occupied by farm buildings." According to the classification in the abstract of assessment, all such land should be included and assessed, either as "irrigated land," "natural hay land," or "dry-farming land." At page 635 of the census report the acreage of improved land in farms in Weld County is given at 410,346. A comparison of this with the abstracts of assessments for the years 1910, 1911, and 1912, and the result thereof, appear from the following table:

TABLE 2.

Shortage in Improved Land in Farms, as Shown by Comparison with Census.

Improved land in farms April 15, 1910, as shown by official U. S. Census of 1910 (p. 635).

Total acres improved land	410,346

Assessed in 1910 (Rec., p. 175).

	Acres	
Irrigated	249,135	
Natural hay	12,040	
Dry-farming	31,412	
		292,587
Shortage		117,759

Assessed in 1911 (Rec., p. 178).

	Acres	
Irrigated	255,169	
Natural hay	12,099	
Dry-farming	19,841	
		287,107
Shortage		123,237

Assessed in 1912 (Rec., p. 170).

	Acres	
Irrigated	266,871	
Natural hay	13,024	
Dry-farming	21,407	
		301,302
Shortage		109,044

NOTE.—At an average value of farm land per acre, as shown by U. S. census ($49.23), the shortage for the year 1912 would represent	$5,368,236
Assuming that the land was assessed as grazing land at $3 per acre, or on a valuation of $9 per acre, there should be deducted	981,396
Net value omitted	$4,386,840

In the foregoing table the average value taken to compute the total omission is that set forth in Table 1, appearing in the census, as the average value per acre of the entire 914,220 acres, being all the land in farms, both improved and unimproved, and therefore is, of course, much below the average value of the improved

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land. Moreover, we have assumed that the acreage thus omitted in the assessment upon improved land was included in the grazing-land assessment at the highest grazing-land valuation—to-wit, an assessable value of $3 per acre, or an actual value of $9 per acre. In both respects the computation errs in favor of the defendants, but the result is an unanswerable argument for the plaintiff's case.

(b) *Domestic animals.*

In a county like Weld a large class of property is live stock. The census enumerated the domestic animals in that county on April 15, 1910; the assessor undertook to enumerate them on April 1, 1910. The census enumerators, as the act of Congress required, classified such animals separately as those on farms and ranges and those located elsewhere. The result of that enumeration appears at pages 635 and 649 of the census report. The table following compares the work of the census officials with that of the county assessor for the years 1910, 1911, and 1912, and shows the result:

Table 3.

Domestic Animals Omitted from Assessment.

Statement showing omissions of live stock from assessment for years 1910, 1911, and 1912, based on U. S. official census for year 1910 (pp. 635, 649).

Numbers of live stock in Weld County, Colo., as per census.

Cattle	43,502
Horses	28,255
Mules	2,342
Swine	16,664

Numbers assessed.

	Year 1910	Year 1911	Year 1912
Cattle	23,640	19,164	18,658
Horses	15,664	15,664	15,890
Mules	1,444	1,476	1,498
Swine	4,016	2,302	2,584

Omitted from 1912 assessment.

Cattle	24,844	@ $16.02	$398,000
Horses	12,365	@ 34.32	424,366
Mules	844	@ 53.63	45,263
Swine	14,080	@ 5.89	82,931
			$950,560
Multiply by 3 for actual value			3
			$2,851,680

NOTE.—The prices used in estimating omitted valuations for the year 1912 are the average prices shown in the Weld County abstract of assessment for that year.

The foregoing table exhibits some surprising results. On April 1, 1910, the assessor could find in the county only 23,640 cattle, whereas on April 15, 1910, the census officials found 43,502. On April 1 the assessor could find only 15,664 horses, whereas on April 15 the census officials found 28,255. On April 1 the assessor could find only 1,444 mules, whereas on April 15 the census officials found 2,342; and on April 1 the assessor could find only 4,016 swine, whereas on April 15 the census officials found 16,664.

Other surprising things appear, among which is the fact that on April 1, 1910, the assessor found in said county 15,664 horses, and on April 1, 1911, a year

later, again found 15,664 horses in said county; from which we are to infer that during the intervening year no mare had foaled, no horse had died, and none had moved into or out of the county.

(c) *Farm implements and machinery.*

According to the census of 1910 (Census Report, p. 635), one of the large items of farm property in Weld County was farm implements and machinery, valued by the census officials at $1,510,168. An examination of the abstracts of assessment for the years 1910 (p. 175), 1911 (p. 178), and 1912 (p. 170) fails to reveal any assessment whatever of this property. There is no heading in the abstract of assessment under which it could logically fall. Apparently it escaped assessment entirely. The only possible place where it could appear upon the abstract would be either under the heading "Carriages and Vehicles of Every Description," or under the heading "All Other Property." Adding together these two items as they appear in the abstract for 1910, and dividing the result by 2—because, if the item in question was included here, it could not have constituted more than one-half of the total of these two classes—we reach an amount of $64,640 on the one-third basis, or $193,920 on the basis of full value, for the item of farm implements and machinery, valued almost on the same day by the census enumerators at $1,510,168.

Pursuing a similar course as to the abstract of assessment for the year 1911, in order to give the assessor the benefit of every doubt and avoid the imputation of a total omission of the item, we gain a result of $118,340 on the one-third basis, or $355,020 on the basis of full value, as against said sum of

$1,510,168. Coming to the abstract for 1912 (p. 171), we find the item of "Carriages and Vehicles of Every Description" to be so reduced in amount from the previous year as to make it certain that farm implements and machinery could not have been included here. Turning then to the item (p. 172) "All Other Property," we find this to have been increased over any previous year to such an extent as to warrant the conclusion that here, if anywhere, are included "Farm Implements and Machinery." Taking one-half of this amount as before, we gain a result of $121,715 on the one-third basis, and, multiplied by 3 to gain the full value, $365,145, as against $1,510,168 shown for this class of property by the census; a shortage on this one item for the year 1912 of $1,145,023.

(d) *Recapitulation as to farm property generally.*

Inasmuch as lands and farm property constitute the material part of Weld County's wealth, we pause here to recapitulate:

As shown by section (a), *supra*, the undervaluations on lands amounted to.....	$18,727,640
and the omission from assessment of improved lands amounted to.....	4,386,840
As shown by section (b), *supra*, the omission from assessment of domestic animals amounted to.....	2,851,680
As shown by section (c), *supra*, the underassessment, or omission from assessment, of farm implements and machinery amounted to.....	1,145,023
The sum of these undervaluations and omissions is	$27,111,183

Bearing in mind, what we stated at the outset, that it is only necessary to make a showing of undervaluations and omissions amounting to $30,842,420, it is obvious that, considering nothing whatever but farm property, we have already nearly reached the necessary total.

The following table shows a like result, upon information obtained exclusively from the census report. It is thus demonstrated that almost exactly the same shortage in valuation appears by consideration of the census statistics as is disclosed by the independent investigation conducted by the plaintiff and the State Tax Commission. In this table comparisons are made with the assessments for each of the years 1910, 1911, and 1912, to show the continuous, systematic, and habitual undervaluation and omission:

TABLE 4.

Comparative Statement Showing Value of Farms and Farm Property and Grazing Lands in Weld County, Colorado, as Taken from the Official U. S. Census of 1910 (pp. 635 and 649), and the Assessed Valuation of the Same for the Years 1910, 1911, and 1912.

	Values per census.	
Land	$45,007,628	
Buildings	4,937,113	
Implements and machinery	1,510,168	
Domestic animals, etc.	4,908,230	
Domestic animals not on farms	438,938	
Total value	$56,802,077	$56,802,077

Assessment for year 1910.
(Rec., p. 175.)

Land	$ 7,411,510	
Buildings	1,251,050	
Implements and machinery.	64,640	
Domestic animals, etc.	1,095,780	
	$ 9,822,980	
Multiply by 3	3	
	$29,468,940	

Assessment for year 1911.
(Rec., p. 178.)

Land	$ 7,500,420	
Buildings	1,202,710	
Implements and machinery.	118,340	
Domestic animals, etc.	939,010	
	$ 9,840,480	
Multiply by 3	3	
	$29,521,440	

Assessment for year 1912.
(Rec., p. 170.)

Land	$ 7,709,756	
Buildings	1,303,280	
Implements and machinery.	121,715	
Domestic animals, etc.	987,050	
	$10,121,801	
Multiply by 3	3	
	$30,365,403	30,365,403
Shortage in valuation for taxation for year 1912		$26,436,674

(e) *Water rights.*

In Colorado the right to the use of water for irrigation is a commodity. It is not necessarily appurtenant to the land. It is bought and sold, both with and without the land to which it may be applied, and is evidenced by various muniments of title. However the title be evidenced, the property right has a distinct value, which is exceedingly large. Mr. Camfield says (p. 243) that such water rights in Weld County had in 1912 an average value of $45 per acre, meaning that a water right capable of irrigating one acre was worth $45; Mr. T. C. Henry says (p. 388) from $50 to $60.

The Colorado statutes require that all property and property rights, both tangible and intangible, be listed and valued for purposes of taxation. (Rev. Stat. 1908, secs. 5528, 5540, 5542, 5543.) They specifically require that a separate assessment be given to water rights, even when appurtenant to particular land. (Rev. Stat. 1908, sec. 5540.) In respect to water rights, these statutory requirements were continuously and systematically disregarded. It is doubtful if there was ever any assessment thereof. If any were assessed, it was only those actually at the time applied to the irrigation of particular lands, and the assessment of these was only in the way of including their value in the value of the lands themselves (p. 51). This the assessor himself frankly admits (p. 306).

This disobedience of the statute was consistent, continuous, and intentional during all the years that Fischer was assessor (1909 to 1912, inclusive). Its necessary result was to permit the escape from assessment of property of large value. Giving the assessor the benefit of the doubt, and assuming that water

rights were assessed to the full extent of the irrigated lands returned by him, we find that in the year 1912 the total acreage of said irrigated lands, according to his abstract, was 266,871 acres; but according to the census (Census Report, p. 664), the acreage which completed irrigation works in Weld County were capable of irrigating in 1910 was 434,008 acres. There was, therefore, an utter failure to assess existing water rights capable of irrigating 167,137 acres, and having a value of at least $40 per acre, making a total omission from assessment on this account of $6,685,480. But, to be extremely conservative, we turn again to the census report and find that in the year 1909 the acreage irrigated in Weld County was 395,514 acres. Deduct this from the total acreage which existing and completed irrigation works were capable of irrigating in 1910, and the result shows the number of acres of water rights not actually applied to land, but available for that purpose, in 1910. Certainly they were no less in the year 1912. Ascertaining the value of these water rights at $40 per acre, we reach a result of $1,539,760, which, at the very least, is the value, omitted from assessment, of water rights owned, but not actually applied.

(f) *Town and city lots and improvements thereon.*

Mr. Link, a member of the State Tax Commission, testified concerning the investigation which that commission had made of the assessment in Weld County for the year 1912 (p. 255). He said that as a result of that investigation the Tax Commission found that town lots and city property, while not assessed upon

the one-third basis, were assessed upon a higher ratio than the other property in Weld County—to-wit, at about 24 per cent of the actual value. This being true, and turning to the figures contained in the abstract for 1912 (p. 171), a simple mathematical computation makes it plain that, expressed in terms of full cash value, the values omitted from the assessment of town and city lots, and the improvements thereon, amounted to $1,100,877.

(g) *The Great Western Sugar Company.*

One of the large institutions doing business in Weld County and assessable by the local assessor is the Great Western Sugar Company. It maintains and operates in the County of Weld three great factories for the manufacture of sugar from beets. It is an inter-county corporation, maintaining and operating a number of other sugar factories in other counties of the State of Colorado. This institution is doubtless the largest and its properties the most valuable of any which the county assessor is called upon to assess. It appears (pp. 392-393) that he made no attempt to assess anything except its tangible property. All intangible values escape assessment. It was the assessor's settled policy and practice not to assess intangible values of any kind, although the statute expressly required him to do so.

The evidence shows that each of these sugar factories was assessed in the year 1912 at $100,000. The evidence also shows that in June, 1911, the president of the Great Western Sugar Company testified before a committee of Congress that the cost of reconstruction or erection of each of these sugar factories, with

the machinery therein, would be $900,000 (Record, pp. 392-393). Giving the assessor the benefit of every doubt, the buildings and machinery at each factory were assessed at $135,000, upon what the defendants claim is a one-third basis, or a total full value of $405,000. The result of this was an undervaluation upon the tangible property, consisting of buildings and machinery, which, expressed in terms of actual value, amounts to $1,485,000. This is shown by the following computation:

Total actual value of factories and machinery at Greeley, Eaton, and Windsor, as per testimony		$2,700,000
Buildings and machinery assessed at each point by assessor at	$135,000	
On the one-third valuation basis would give an actual valuation of	405,000	
for each of the three plants, or a total taxable valuation for the three plants, as found by the assessor, of		1,215,000
Undervaluation		$1,485,000

(h) *Total and intentional omission of all intangible values.*

The statutes expressly required the assessment and taxation of all intangible values. (Rev. Stat. 1908, secs. 5440, 5442, 5443.) In the case of corporations this was to be determined by ascertaining the value of the entire plant upon the stock and bond basis. (Rev.

Stat. 1908, secs. 5591, 5592, 5593.) As to corporations subject to the jurisdiction of the assessor, but doing business in more than one county, it was specifically required that each file with the Auditor of State a report, giving, under oath, complete information whereby the various assessors might determine such intangible value, and it was required that the assessor of each county assess that part of the intangible values bearing the same ratio to the entire intangible value as the value of the tangible property in his county bore to the tangible value of the property of the corporation wherever situate. (Rev. Stat. 1908, sec. 5594.) Every corporation was also required to file an annual report, under oath, with the Secretary of State, giving complete information from which the assessor could readily ascertain the extent and value of its intangible property. (Rev. Stat. 1908, sec. 911; Session Laws 1911, p. 255, sec. 2.) All these reports were open to the inspection of the county assessor, and the principal object thereof was to afford him information for purposes of assessment.

Notwithstanding these express requirements of the statute, the assessor consistently and continuously, year after year, failed and refused to make any assessment whatever of intangible values. His refusal was intentional, systematic, and, at least in 1912, with actual as well as constructive knowledge of the law's requirement. He himself expressly so testified. (Rec., pp. 302, 303, 309.)

It is impossible to state with exactness, or even to approximate, the sum of the values which thus intentionally were permitted to escape assessment. Beyond question, in a county like Weld, the total must

have been enormous. The consideration of intangible values in the case of a going corporation invariably results in an assessment much greater than the value of its tangible property alone. The members of the State Tax Commission, which was obeying the statute and assessing the intangible values of railroad companies, so testified. (Rec., pp. 239, 254, 263.) The result is indicated in the case of the Union Pacific, whose tangible property in the state was worth in 1912 (p. 167) $9,764.52 per mile, but whose property was assessed by the State Tax Commission for that year at the rate of $13,183 per mile, from which it appears that more than 33⅓ per cent had been added to the value of the tangible property, consisting of intangible elements of value. Another marked example of this is in the case of certain local public utilities assessed in the year 1912 by the assessor of Weld County, and, by reason of a change in the law, assessed in 1913 by the State Tax Commission. (A table of these appears at page 173 of the Record.) The assessor assessed tangible property only, and, using what he claims was the one-third basis, reached an assessable value on these local utility companies of $19,050, which on the one-third basis means a full value of $57,150. The State Tax Commission assessed at the full value in 1913, and, including intangible values, found these same properties to be worth $222,960—a difference of $165,810. In these cases the consideration of intangible values increased the total valuation by nearly 300 per cent. It is, therefore, more than fair to assume that, if the assessor had obeyed the law and assessed intangible values of corporations, he would have added

at least one-third to his valuations on property belonging to such corporations subject to his jurisdiction.

In a county like Weld, a very large amount of property is owned, and great enterprises are conducted, by corporations which are subject to assessment by the county assessor. In addition to the ordinary business corporations, which are numerous, there are great irrigation companies, ditch and reservoir companies, power companies, and other like institutions. Taking the case of the Great Western Sugar Company alone, its tangible property in Weld County, as shown by the testimony mentioned above, was worth in 1912 not less than $2,700,000. Assuming, as we may, that its intangible property was worth at least one-third of its tangible, it results that in the case of this one corporation a value of $900,000 entirely escaped assessment. In the case of the four public-utility corporations mentioned at page 173 of the record, and referred to above, it is demonstrated that by the illegal method employed by the assessor nearly $166,000 of intangible value escaped assessment. To say the least, we are doing the assessor no injustice in assuming that the intangible values thus allowed to escape amounted, as to all the other corporations in Weld County, to not less than the intangible values attaching to the Great Western Sugar Company. It is, therefore, perfectly safe to say that, by the erroneous and illegal method adopted by the assessor and his intentional violation of the law, at least $1,800,000 of intangible values entirely escaped assessment. We think it admits of no doubt that the values thus left untouched were enormously greater than this amount.

(i) *Moneys, notes, and credits, particularly merchants' credits.*

The statute specifically required the assessment of moneys, notes, and credits, and elaborate provisions were made for ascertaining the amount thereof. (Rev. Stat. 1908, secs. 5579, 5580, 5581.) From the value of property of this character the taxpayer was entitled to deduct certain of his debts, but this he could do only upon filing with the assessor a statement, under oath, setting forth in detail the amount and separate items of such claimed indebtedness, showing with particularity each person to whom any such sum was payable and the residence of such person, when the same accrued, on what account, and the amount thereof; which statements under oath the assessor was required to file and preserve. And it was further provided that if any assessor violated the terms of said statute, he should be deemed guilty of a misdemeanor and subject to a fine. (Rev. Stat. 1908, secs. 5584, 5585.) These provisions were in no manner complied with, but, on the contrary, were intentionally violated by the assessor. This he frankly admits. (Rec., pp. 300, 301).

This violation of the statute also was continuous, consistent, and systematic, covering the entire period while Mr. Fischer was assessor. As a result, these important items of property entirely escaped assessment. In 1910, bank deposits were not assessed at all; moneys, credits, and book accounts, at $54,270, and promissory notes and other written evidences of indebtedness wholly unassessed. (Rec., p. 176.) In 1911, bank deposits were assessed at $17,750; moneys, credits, and book accounts not assessed at all, and promissory notes and other written evidences of indebtedness assessed at $1,400. (Rec.,

p. 180.) In 1912, bank deposits were assessed at $18,940; moneys, credits, and book accounts not assessed at all, and promissory notes and other written evidences of indebtedness not assessed at all. (Rec., p. 171.) Some things are simply unbelievable. It cannot be possible that, in a county like Weld, there were no bank deposits in 1910, and practically none in 1911 and 1912, and that in these years there were no moneys, notes, and credits subject to assessment. It cannot be said that indebtedness offset credits, because under the law it cannot be offset except by the filing of the specific claim under oath, the purpose of which was not only to relieve the debtor, but to furnish information whereby the creditor might be assessed, and no such claims were made or filed.

It is impossible at this time to state what values thus escaped assessment. That they were enormously large admits of no doubt. In the matter of merchandise and merchandise credits alone, the proof shows without dispute that in the year 1912 the value thereof in Weld County, according to Dun's Mercantile Reports, was $5,200,700 (Rec., pp. 105, 106); and the following computation demonstrates that, giving the assessor the benefit of every doubt, there were omitted from assessment in 1912 merchandise and merchandise credits amounting to $3,080,840:

Total value of merchandise and merchants' credits shown by Dun's Mercantile Reports, as per affidavit of A. W. Scribner (pp. 105, 106)		$5,200,700
The abstract of assessment in Weld County for the year 1912 shows an assessed valuation of merchandise and capital employed in manufacture of	$792,680	
From this should be deducted: Machinery assessments of three sugar plants, $35,000 each	$105,000	
And added: Total bank deposits assessed by the assessor for the year 1912 and included in his abstract	18,940	
Making net deduction	86,060	
Net assessment of merchandise and capital employed in manufacture	$706,620	
Multiplied by three for assessor's actual valuation equals		2,119,860
Merchandise and merchants' credits omitted		$3,080,840

(j) *Bank deposits.*

The statute expressly provides for the assessment of bank deposits, and contains elaborate provisions for ascertaining the amount thereof. (Rev. Stat. 1908, sec. 5610.) The banks themselves are required to make reports to the assessor, from which the amount of such deposits is readily ascertainable. (Rev. Stat. 1908, sec. 5756.) In addition to this, as is well known, all such banks periodically and at short intervals make detailed reports, which are public property. Notwithstanding this, it is fair to say that the assessor utterly failed to assess bank deposits; that this failure was continuous and systematic, and prevailed during the entire period of years covered by the proof in the case at bar. In 1910 he found no bank deposits whatsoever (p. 176), in 1911 only $17,750 (p. 180), and in 1912 only $18,940 (p. 171). As shown above, this result was not due to deduction of debits, because it could not be. But the proof shows that the average bank deposits in Weld County in the year ending April 1, 1912 (which is the period to be covered by the assessment for 1912), was not less than $2,973,648.41 (Rec., p. 174). Making the liberal assumption that 10 per cent of the total deposits were public funds, not subject to assessment (p. 346) we deduct on that account $297,365. In addition to this, and to the end that no injustice may be done the assessor, we deduct $300,000 on account of merchants' credits possibly consisting of bank deposits. In the last preceding section hereof we demonstrated that the total amount of merchandise and merchants' credits omitted from the Weld County assessment in the year 1912 was over $3,000,000. Assuming that

one-half of this amount, or $1,500,000, is represented by credits instead of merchandise, and that possibly 20 per cent of such credits may consist of bank deposits, we here deduct from bank deposits the sum of $300,000, because it may possibly have been included in the amount of omissions from assessment stated in the previous section. Total deductions are therefore to be made of $597,365, giving the net amount of bank deposits omitted from assessment $2,376,283.

(k) *Clocks, watches, jewelry, and like property*

As appears from the abstracts of assessment, in 1910 (pp. 176, 177) the assessor found in Weld County 203 clocks and watches, having a value of $2,240, and jewelry, gold and silver, diamonds and other precious stones having a value of $3,800; in 1911 (pp. 179, 180), 125 clocks and watches, having a value of $1,100, and jewelry, gold and silver, diamonds and other precious stones having a value of $840; in 1912 (pp. 171, 172), 147 clocks and watches, having a value of $1,320, and jewelry, gold and silver, diamonds and other precious stones having a value of $840.

The ridiculous character of such assessments in a wealthy county like Weld, with a population of nearly forty thousand, requires no comment.

(l) *Excessive exemptions allowed.*

The Constitution of Colorado provides (Art. X, sec. 3) "that the personal property of every person being the head of a family, to the value of two hundred dollars, shall be exempt from taxation." It was obviously intended, and the statute requires, that

the property to be exempted, as well as the total of the property upon which the exemption was to be applied, should be assessed at its full value. (Rev. Stat. 1908, secs. 5541, 5545.) It has been the constant practice of the assessor in Weld County to deduct this exemption from the assessable valuation, and on his annual abstracts of assessment to deduct the aggregate of these exemptions from the aggregate of the assessable values in the county, thus obtaining the total net assessment by the assessor. The amount so deducted was, in 1910 (p. 177), $570,200; in 1911 (p. 180), $512,800, and in 1912 (p. 172), $520,600. The total amount so deducted is therefore substantially the same for each year.

It has, however, been the constant practice to make this deduction at the full value of $200 from an assessment made upon what the defendants claim was a one-third basis, and what the plaintiff claims was a one-fifth basis. The necessary result is that, according to the defendants' contention, the deduction made has been three times too great, and, according to plaintiff's contention, five times too great. This the defendants frankly admit. They further admit that in 1909, 1910, and 1911 the assessor had deducted the full $200 exemption from the one-third valuation (pp. 303, 304), and that this resulted in an excessive and unlawful deduction, as described; but they insist that in 1912 the plan was changed so that the result was not illegal. The assessor attempts to explain this (p. 304). The explanation fails to convince. The abstract of assessment for 1912 speaks for itself. The amount thereon shown (p. 172) as "total net assessment by the assessor" is the amount

at which property in his county subject to his jurisdiction was actually assessed. The gross assessment was obtained by fixing values at one-third the actual value, as defendants claim, or, as plaintiff claims, at one-fifth the actual value. The amount deducted was the same in 1912 as in previous years. It results as a mathematical demonstration that in 1912, as in previous years, the assessor deducted on account of exemptions at least three times as much as he should, and, if plaintiff's claim be correct, at least five times as much as he should.

To express it all in terms of full cash value, if, following plaintiff's contention as to the basis of assessment, both assessments and exemptions were now multiplied by 5, the total deduction for exemptions would be $2,603,000, or $2,082,400 more than it should have been. If, adopting defendants' contention as to the basis of assessment, both assessments and exemptions were now multiplied by 3, the total amount deducted for exemptions would be $1,561,800, or $1,041,200 more than it should have been. It results that, for purposes of comparison with full values, and adopting the lowest possible figure, excessive exemptions were allowed to the amount of $1,041,200.

(m) *Testimony of the State Tax Commissioners.*

The conclusions which we have drawn are fully sustained by the testimony of the State Tax Commissioners. Each of them testified that, after a very complete investigation of the 1912 assessment in Weld County, conducted by members of the board, and also by their representative, a former secretary, the board

had reached the conclusion that said assessment was probably less than, and in any event did not exceed, 20 per cent of the actual value of the property in the county subject to the jurisdiction of the county assessor. Mr. Fairall, former secretary of the board, and its agent selected for the purpose of making the investigation, testifies with much detail (pp. 266, 267, 268). Dr. Phillips, a member of the commission, goes into the matter thoroughly (pp. 235, 238), and says (p. 238) that "the assessed value did not exceed 20 per cent of all the property in the county." Mr. Link, another member of the Tax Commission, testifies fully upon this point (pp. 253-256), and says (p. 255) that, with the exception of sheep, which appeared to be assessed at more than one-third value, and town lots, which appeared to have been assessed at about 24 per cent of full value, all other property in the county locally assessable was assessed at from 17 to 19 per cent of its actual value. Mr. Adams (p. 263), the third member of the commission, accepts the judgment of his associates and concurs therein. All of these gentlemen testified that the property of the plaintiff was in said year fully assessed at one-third of its actual value.

These findings of the State Tax Commission are persuasive, if not absolutely conclusive. Under the act of 1911 (Session Laws 1911, pp. 612 et seq.), as recently upheld and expounded by the Supreme Court of Colorado (People vs. Pitcher, 56 Colo., 343; 138 Pac., 509), the Colorado Tax Commission is supreme in all matters of assessment. Its judgment, or that of its members, if different from the judgment of the local assessor, must prevail.

We submit that, if upon this point nothing else had been presented except the evidence of the Tax Commission, a sufficient showing of discrimination would have been made. When it corroborates and confirms other evidence of the strongest import coming from independent sources, it should be accepted as conclusive.

Taylor vs. Louisville & Nashville, 88 Fed., 350, 362.

(n) *Recapitulation and conclusion.*

We stated at the outset of this portion of the argument that, if plaintiff were able to show an underassessment, occasioned by undervaluations and omissions, to an amount, expressed in terms of full cash value, of $30,842,420, its case was established, and to the full extent claimed. No doubt at tedious length, we have reviewed some of the important points brought out by the evidence relative to such underassessment. Without going into all of the points suggested by the evidence here, without producing evidence as to other undervaluations and omissions from assessment which, as the evidence clearly indicates, doubtless existed, we have been able to show, at the very least, an undervaluation amounting in the aggregate to $38,860,634, as is clearly set forth in the following table:

RECAPITULATION.

Statement Showing Shortage in Assessments in Weld County, Colorado, for the Year 1912, by Reason of Omissions and Undervaluations of Taxable Property, Viz.:

Bank deposits	$2,973,648	
Less deductions	597,365	
		$ 2,376,283
Entire omission of intangible property of corporations, including Great Western Sugar Co.		1,800,000
Undervaluation of tangible property of Great Western Sugar Co.		1,485,000
Excessive exemptions allowed		1,041,200
Undervaluations and omissions of farm property, as per statement		26,436,674
Undervaluation of town and city lots, and improvements thereon, as per testimony of C. P. Link		1,100,877
Omission and undervaluation of merchandise and merchants' credits		3,080,840
Omitted values of water rights owned, but not actually applied, 38,494 acres at $40 per acre, as per census, page 664.		1,539,760
Total		$38,860,634

The defendants attempted to meet this showing by the testimony of certain witnesses, principally by that of the assessor, certain of his deputies, two of the county commissioners, and the county attorney. We have already pointed out the significant fact that

almost without exception the property owned by each of these witnesses, according to his own estimate of the market value, was flagrantly underassessed. Upon this branch of the case the assessor himself really concedes the full contention of the plaintiff. Mr. Fischer had been the assessor for four years. The assessment of 1912 was the last one which he made. About January, 1913, having just completed his assessment for 1912 and delivered the tax roll to the treasurer, he had a conversation with Mr. Fairall, secretary of the State Tax Commission, in which he expressly stated, as he himself admits, that the value of the property in Weld County subject to assessment was not less than one hundred million dollars (Rec., pp. 269, 270, 272, 294, 297), which fact he reasserts in his testimony here (pp. 297, 298). Having had four years' experience, he should have known as much as anyone in the county about the property therein. Assuming that he meant by his statement to include all property, both that assessed by him and also that assessed by the State Tax Commission, his statement amounts to an express admission that his assessment did not exceed one-fifth of the value of the assessable property subject to his jurisdiction. This admits of mathematical demonstration. In 1912 (p. 172) his assessment amounted, in round figures, to $15,000,000, and that of the Tax Commission to $5,000,000, making a total of $20,000,000. Plaintiff's contention is that the assessor had assessed on a basis of 20 per cent of the full value; defendants' contention is that the Tax Commission had assessed on a basis of 19.8 per cent of full value (pp. 22, 25, 26). Conceding both contentions, and multiplying the total assessment in Weld County, including both

classes of property, by 5, the result is $100,000,000, which Mr. Fischer said was the actual value in 1912. But plaintiff contends, and we submit has established beyond question, that the property assessed by the State Tax Commission was assessed at not less than 33 1/3 per cent of its full value. If, therefore, we multiply $5,000,000, the Tax Commission's assessment, by 3, it will be necessary to multiply the assessor's assessment approximately by 6 in order to reach the total conceded by Mr. Fischer.

The assessor's total assessment was $15,421,210; that by the State Tax Commission in Weld County was $5,017,500. Multiplying each of these by 3, and adding the results, the total obtained is $61,316,130. Deduct this from $100,000,000, conceded by Mr. Fischer to be the aggregate of all values in Weld County, and the result shows a deficit of $38,683,870; which almost exactly agrees with the undervaluation shown upon the foregoing recapitulation as the result of the various sources of information set forth in the preceding pages.

It is unnecessary to make, and space would not permit, a further analysis of the defendants' testimony upon this branch of the case. At most, it does no more than raise an issue upon which, we respectfully submit, the evidence strongly preponderates in favor of the plaintiff. Upon a preliminary hearing, the court may not and will not determine such an issue. If it did, it would, as we earnestly contend, be obliged to find in favor of the plaintiff. In any event, the evidence was such as to invite and require further investigation, and so made necessary a preliminary injunction.

We cannot better characterize the testimony of the defendants' witnesses upon this branch of the case than by referring to the language employed upon a similar occasion and with respect to like testimony by the State Board of Equalization of Kentucky, which is quoted with approval in *Louisville & Nashville vs. Bosworth,* 209 Fed., 380, at 459:

> "From the testimony of the average witness who appears before the board, there is very little good land in his section of the state, and what is there is mainly in adjoining counties; in his particular county there is a poor streak extending the length and width of the county from which all the timber has been cut and marketed; the process of erosion has carried all the fertile soil into the Gulf of Mexico; that a peculiar and unprecedented condition exists in regard to the bottom lands in his county, unlike the conditions along most streams that enrich the land, but the current of the stream changes and washes it away, and, if by accident there is a deposit, it is always of sand, that destroys its future productiveness; that there is here and there an occasional oasis of small area upon which the tireless farmer can eke out an existence, and, by the addition of a small mortgage, pay his taxes.
>
> The cities do not labor under the same difficulties, but their difficulties are just as difficult. It seems that in all the cities the railroads have secured quantities of land for terminal facilities that are withheld from as-

sessment; in addition to which, the smoke, noise, and dust has destroyed the value of property for blocks on either side. Schools and churches have also acquired valuable property which is exempt from taxation; this also lessens their total. The money in banks is owned by non-residents, country banks, and the federal government. The remaining few dollars left among their citizens is mainly for the purpose of street car fare. Business has been removed from the principal streets and is yet unlocated. In fact, the city would go into the hands of a receiver if there were anything to receive or anybody who would receive it."

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4. *The discrimination complained of was systematic, habitual, intentional, and illegal.*

We respectfully submit, upon what has gone before, that the discrimination complained of, and to the extent claimed, actually existed.

But defendants, in the court below, asserted, and with apparent success, that such discrimination, even though it existed and was prejudicial, was not illegal, because it had not been shown that it was intentionally brought about.

In other words, it was contended that the discrimination, if it existed, was the result of an honest mistake or mistakes of judgment; that it was casual, accidental, and sporadic, and not habitual, systematic, or intentional.

Upon the evidence analyzed in the last preceding portion of this brief, we respectfully submit that these undervaluations and omissions from assessment could not possibly have been the result of an honest mistake or mistakes of judgment. They were repeated year after year, and so were continuous, habitual, and persistent. They related to large classes of property, and always to the same classes, and so were systematic. They were of such a character that they could not possibly have continued year after year as they did, without knowledge of the assessor and other officers of the county that they existed; and so they were intentional.

Actual bad intent is a state of mind. Being psychological, intangible, and impossible of perception by anyone except the individual who conceives the intent, it is obvious that intent must, in the majority of the cases, be proven by circumstantial evidence. And so it has been repeatedly held, even in criminal cases where liberty or life was at stake, that intent was shown by evidence of the act which followed it, the nature thereof, and its result. In cases such as this, the intent to underassess or omit from assessment, thus producing prejudicial discrimination, is inferred from the continuity of the practice.

In *A. T. & S. F. Ry. Co. vs. Sullivan,* 173 Fed., 456, it was contended by defendants, as it is here, that the underassessments and the omissions from assessment were unintentional, and therefore not illegal. But, notwithstanding the denial by the assessor of bad intent (p. 461), the court held that the intent would be presumed from the act and its consequences.

In the matter of omissions from assessment, there was evidence in the Sullivan case that the assessor

had omitted fat stock, and had done so intentionally. There was also evidence that he had failed to assess bank deposits, other credits, watches and clocks, and other like taxable property; but there was no direct evidence that the failure was intentional.

Upon this subject, the court, speaking through His Honor, Judge Sanborn, said (p. 469):

> "Moreover, there is conclusive evidence that there were deposits in the banks to the amount of $230,000.00, there is evidence that not more than half of the credits thus evidenced could probably have been offset by debts of the depositors, there must have been other credits besides bank deposits and there must have been watches and clocks that were taxable in this county. * * *"

(P. 470):

> "The systematic and intentional omission of watches, clocks and jewelry, credits and fat stock by the County Assessor from the assessment of the property within his jurisdiction, however innocent in actual intention, was either an intentional fraud upon the complainant or such a gross mistake that it was a fraud in law. * * * Not only this, but the omission of the fat stock and the credits had been repeated by the officials of this county year after year. It was their habitual practice to omit them, and this practice threatened to continue. It had grown into a rule, and yet it was a vio-

lation of the Constitution of the state, which requires that 'all taxes * * * shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal' (Article 10, sec. 3), and of the statute, which required all personal property not exempt to be assessed."

(P. 471):

"It was systematic, intentional and continuing, and where there is a systematic, intentional, containing omission or undervaluation of other taxable property by the taxing officers of a state or county, in violation of the Constitution or law, which inevitably effects an unjust discrimination in taxation against the property of the complainant and against other property similarly situated, a bill in equity will lie to enjoin the collection of that portion of the tax which resulted from the illegal discrimination."

In the Sullivan case, as to all the items mentioned except fat stock, there was no evidence of intention to omit, except the fact of continuity of the practice. Thus the intent was shown by circumstantial evidence, and found to exist in the face of a denial by the county assessor; and this was done upon final hearing, where the applicable rules are radically different from those controlling on application for preliminary injunction.

The rule thus laid down by the Circuit Court of Appeals has been repeatedly enunciated elsewhere.

In *Southern Railroad Co. vs. North Carolina Commission*, 104 Fed., 700, Judge Simonton said (p. 702):

> "The complainants allege that there is an established rule in North Carolina whereby all real and personal property other than railroad property is assessed for taxation below its actual value in money, and so the action of the corporation Commission in assessing railroad property at its actual value in money creates a discrimination which is unlawful. If this alleged rule existed in resolutions of the various boards of assessors, or in any compact between them, oral or written, or in any statutory enactment, the proper mode of proving it would be by evidence directly showing the existence of such rule. If, however, the existence of the rule cannot be shown in this way, but is a matter of inference from a uniform course of conduct, then the only mode of proof is by showing a sufficient number of instances from which such a course of conduct could be inferred. In the one case the conclusion would be reached *a priori;* in the other *a posteriori.* In the one case we would go from the general to the particular; in the other from particular to the general. If, therefore, the complainants cannot establish the existence of the rule except by inference, it is lawful for them to introduce evidence as to the particular instances from which they seek to establish the general rule."

In *Louisville & Nashville vs. Coulter,* 131 Fed., 282, at page 311, it is said:

> "But it is hardly probable that an undervaluation could be systematic or habitual, and not be intentional. Probably then, the essential features of an illegal discrimination of the character under consideration is that there should have been a systematic or habitual undervaluation. An undervaluation that is not so cannot be complained of though intentional, and an undervaluation that is so cannot but be intentional."

In *Railroad and Telephone Companies vs. Board,* 85 Fed., 302, 305, intent to discriminate was inferred from the systematic and habitual course of procedure which caused the discrimination.

In *Central Railroad Co. vs. Jersey City,* 199 Fed., 237, 242, a like inference was made.

And in the Chicago Traction cases the intent of the board to discriminate was inferred, both by the Circuit Court and by the Supreme Court, from circumstances far less persuasive than those here presented.

> Chicago Union Traction Co. vs. State Board of Equalization, 114 Fed., 557, 566.
>
> Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 36, 37.

In the foregoing cases these inferences were drawn in the absence of express proof, and permitted to control in spite of explicit denials by the assessing

officers of any bad intent. The rule, of course, is not confined to cases involving assessment and taxation. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the action, or course of action, and its result. Actions speak louder than words. The actor will not be permitted to deny an intent which is reasonably inferable from his deeds.

Agnew vs. United States, 165 U. S., 36, 53.

Allen vs. United States, 164 U. S., 492, 496.

Reynolds vs. United States, 98 U. S., 145, 167.

Pettibone vs. United States, 148 U. S., 197, 207, 208, 212.

In *Knapp vs. White,* 23 Conn., 529, 543, it was said:

> "Indeed, we always draw inferences from our observation of the usual habits of men, which lead to a great variety of presumptions. These inferences are the conclusions drawn by reason, and common sense, from premises established by proof, and are as applicable to questions of intention, where the intention of parties becomes important, as to any other disputable fact."

In *Columbus vs. Dahn,* 36 Ind., 330, 337, the court said:

> "We think that the question, whether a person intends to make a dedication of ground to the public for a street or other purpose, must be determined from his acts

and statements explanatory thereof, in connection with all the circumstances that surround and throw light upon the subject, and not from what he may subsequently testify as to his real intent in relation to the matter."

In *Babcock vs. Eckler,* 24 N. Y., 623, 632, it is said:

"Intent or intention is an emotion or operation of the mind and can usually be shown only by acts or declarations, and as acts speak louder than words, if a party does an act which must defraud another, his declaring that he did not by the act intend to defraud is weighed down by the evidence of his own act."

In *Vermont vs. United States,* 174 Fed., 792, the court, speaking through His Honor, Judge Adams, said (p. 795):

"Rational beings are presumed to intend the natural and reasonable consequences of their acts, and fair inferences from established facts are oftentimes more reliable and persuasive of the truth, especially when intent or purpose is involved, than oral statements concerning them."

To the same effect:

Morgan vs. Railroad Company, 96 U. S., 716, 723.

Indianapolis vs. Kingsbury, 101 Ind., 200, 213.

Los Angeles vs. McCallum, 156 Cal., 148.
Duckett vs. Keet etc. Dry Goods Co., 99 Mo. App., 444; 73 S. W., 926, 927.

These rules are peculiarly applicable here, because, as was said in *Lewis vs. McDonald,* 83 Neb., 694; 120 N. W., 207, 209:

> "When the intentions of an interested witness become a matter for judicial inquiry, they are ascertained by a consideration of his conduct and not by his declarations or testimony as to what his intentions were."

Defendants, upon this branch of the case, rely upon the testimony of the assessor, and certain of his deputies, who, in the court below, protested, rather weakly, that their intentions had been good and that they had tried to do their best. Even if these protestations had been vigorously made, they could not prevail against the evidence of their previous acts. All of these men were interested witnesses. They were no longer officers of the county, but they were defending their official conduct while they had been such officers. Therefore they had a personal interest, peculiar to themselves, in addition to the interest possessed by every property-owner in Weld County whose property was locally assessed, to maintain, if possible, the assessment made by the assessor, because it resulted in allowing such property-owners to escape their just share of the taxation.

The assessor usually had about twenty field deputies, who gathered the information upon which the assessment was based (p. 286). Six of them testified for the defendants at the hearing. These deputies

were the same year after year (p. 299). Each man was required to cover from one to ten townships (p. 300), and they were required to complete their work within thirty days. In considering the testimony of these men, it must be borne in mind that each one resided in the district where he made his inquiries, that those whose property he was assessing were his friends and neighbors (pp. 300, 317, 332), and that as a consequence these deputies took the word of the property-owners without question as to what assessable property they had (pp. 318, 326, 334, 341). The deputies even assessed their own property in their respective districts (p. 326). And the reports of these deputies were accepted without question by the assessor (pp. 299, 300). It is not surprising that property was not fully assessed, and that much property escaped assessment entirely. Moreover, the interest of these deputies and this assessor, both in making the assessment and in defending it, plainly was not only to sustain their own official acts, but also to carry out what for years had been the policy of the county—i. e., to maintain the disproportionate assessments which resulted in shifting the tax burden from themselves, their friends, neighbors, and constituents, to foreign corporations. Without further proof, the situation, as Mr. Justice Brewer said in *Pittsburg etc. Co. vs. Backus*, 154 U. S., 421, strongly suggests "that which is unfortunately too common—an effort to cast an unreasonable proportion of the public burden upon corporate property."

But we are not without evidence of actual intent to underassess, and of actual violation of law with that result. The statute expressly requires that all property, both tangible and intangible, be listed and

valued by the assessor. (Rev. Stat. 1908, secs. 5528, 5540, 5542, 5543.) To this end the assessor is required to obtain from each individual of the county a written statement or schedule, under oath, of his or her property; or, if he have no property, a statement under oath to that effect; and specific information must be given, under oath, as to each item on the schedule, and specific answers made, under oath, to each interrogatory on the schedule. (Rev. Stat. 1908, secs. 5573, 5586, 5583, 5609.) In addition to this, the assessor is given the broadest inquisitorial powers, which he is required to exercise in every case where necessary to ascertain the existence of taxable property. (Rev. Stat. 1908, secs. 5574, 5578.) Notwithstanding this, the assessor never attempted to make use of his inquisitorial powers (Rec., p. 300), and in 1912, the year of the assessment here in question, apparently following the usual practice, in thousands of cases no schedules at all were obtained (p. 303). A large proportion of those taken were unsigned (p. 299) and unsworn to, and in not to exceed 1 per cent of the total were the interrogatories printed on the schedule answered at all (p. 272). Is it to be wondered at that a complete or full assessment was not obtained? And how can such conduct of the assessor be regarded otherwise than as a deliberate, consistent, and intentional failure to comply with the law which required him to make a full and complete assessment?

These failures and delinquencies occurred year after year, repeatedly, consistently, continuously, and persistently, and in the face of express knowledge and notice of the erroneous and illegal results thus obtained. Mr. Fischer was the assessor of Weld County for four years, 1909 to 1912, inclusive. At the be-

ginning of his term he entered into a solemn agreement with the State Board of Equalization that he would assess the property in his county at one-third of its actual value, which agreement remained in effect during all of the years mentioned above (pp. 33, 34, 35-38). At the same time, having sat with the State Board of Equalization throughout their work of assessment, he fully approved the assessment of the Union Pacific and the other assessments made by the board, and solemnly agreed that they were at least one-third of the actual value (p. 37). Notwithstanding this, the assessment made by Mr. Fischer in 1909 was disproportionately low. But the railroad company took no action, doubtless hoping for better results the following year (p. 212). But in 1910 the assessment was no better. In that year complaint was made to the State Board of Equalization that the property in his county was underassessed (pp. 33, 34, 38, 39, 212, 213, 215, 265, 269, 271). Upon the showing then made, the State Board of Equalization found, and informed Mr. Fischer, that his assessment was too low, giving him, by way of illustration, a list of a large number of properties flagrantly underassessed, and directed that he raise his entire assessment. He deliberately disobeyed this order. He failed to raise his assessment, even as to the specific properties mentioned in the list. On the contrary, he lowered it (pp. 275, 298). The Union Pacific was compelled to and did bring a suit in the Circuit Court of the United States of exactly the same character as the suit at bar, attacking the assessment for 1910 upon the same grounds here alleged, and seeking injunctive relief. A temporary injunction was issued. That suit was begun in August, 1911, when the taxes based on the

assessment of 1910 were payable (p. 212). At that time Mr. Fischer was engaged in making his assessment for 1911. Notwithstanding the repeated complaints, the orders of the State Board of Equalization, the suit which had been brought and was pending, and the injunction issued relative to the 1910 assessment, Mr. Fischer, as he admits, made no change whatever in his methods or in his basis of valuation (p. 298). The 1911 assessment was as bad as that of 1910 (pp. 212, 213, 215). The Union Pacific was not compelled to bring suit respecting the assessment for 1911. Prior to the time when the taxes arising from that assessment became delinquent, and during the month of April, 1912, representatives of the railroad company met the officers of the county at Greeley and agreed upon a settlement with respect to the taxes of 1911 and 1912. The officers of the county accepted 75 per cent of the taxes in full settlement for both years, and the suit was dismissed (p. 212). Manifestly, this was an admission by the assessor, the county commissioners, the county treasurer, and the county attorney, all of whom were present and concurred in said settlement, that at least for the years 1910 and 1911 the assessment was disproportionately low. But we need not depend upon inference. Mr. Fischer, the assessor, then and there expressly admitted, in the presence of the members of the board of county commissioners and other county officers, and apparently without dissent from them, that his assessments were too low (pp. 272, 281). The very extensive list of transfers, covering all sales of lands from January 1, 1909, to August 23, 1910, the considerations paid, and the comparative assessments, which is an exhibit in this case (pp. 76, 78, et seq.),

and which had been prepared by the Union Pacific prior to that time, was then in the hands of the county assessor and the other county officials. The county assessor recommended, and the county commissioners agreed, that there should be a careful reappraisement of the county; that special effort should be made to secure property previously omitted from assessment, and that additional and skilled help should be employed for this purpose. It was further agreed that Mr. Holcomb, a representative of the Union Pacific, should accompany the appraisers, to assist them in their work. None of these things were carried out, because the county commissioners refused to appropriate the necessary money. The assessment for 1912 involved no changes of method, and showed no improvement over that of previous years, as the assessor himself admits (p. 308).

In the case of lands the statute expressly provided that they should be assessed at market value. (Rev. Stat. 1908, sec. 5591.) During Fischer's entire incumbency of the office no attempt whatever was made to comply with this statute. The lands were assessed, not on the basis of their market value, but wholly without reference thereto. The assessor and his deputies paid no attention to the prices at which the lands were selling. The standard of value which they evolved and applied was based upon the net returns from farming operations as then conducted. This they called the "return value," as distinguished from "market value" or "sale value." The testimony of all of them is clear upon this point (pp. 305, 312, 313, 322, 326, 330, 335, 339, 340, 346). The county attorney, Mr. Bliss, counsel of record in this case,

expounded this theory at length (Rec., pp. 369, 370, 371, 372). Indeed, it appeared from his testimony that the net return which he thought ought to control was that which the landlord would receive where a farm was operated by a tenant on shares. Not only was it erroneous and illegal to assess with respect to what they called the return value, rather than at the market value, but, in addition, the county attorney's exposition thereof was wholly inapplicable to Weld County, because, as the census discloses (Census Report, p. 641), only one-third of the farms in Weld County are operated by tenants, the rest being operated by the owners thereof. That the assessment of lands according to return value rather than according to market value was a flagrant violation of the statute admits of no doubt.

White vs. Pennsylvania R. R. Co., 229 Pa., 480; 78 Atl., 1035, 1037.

It was the application of a wrong principle of assessment—of a rule of assessment in conflict with express statutory direction; and the resultant discrimination, which the evidence discloses, was exceedingly great, therefore actionable, even though there was no actual bad intent.

> "When the overvaluation of property has arisen from the adoption of a rule of appraisement which conflicts with a constitutional or statutory direction, and operates unequally, not merely on a single individual, but on a large class of individuals or corporations, a party aggrieved may resort to a court of

equity to restrain the exaction of the excess, upon payment or tender of what is admitted to be due."

Stanley vs. Supervisors, 121 U. S., 535, 550, 551.

Such a case stands upon a different footing from those where nothing appears except a mere over- or under-valuation, and in which fraud must be shown to render the result actionable. Where an illegal principle of assessment, or standard of value, has been used, the resultant damage is always actionable, because it is caused by violation of law.

Fargo vs. Hart, 193 U. S., 490, 502.

San Francisco National Bank vs. Dodge, 197 U. S., 70, 81.

Norwood vs. Baker, 172 U. S., 269.

A. T. & S. F. vs. Sullivan, 173 Fed., 456, 470.

Coulter vs. Weir (C. C. A. 6th Cir.), 127 Fed., 897.

In the case last cited, the court, speaking through Mr. Justice Lurton, then a circuit judge, said (p. 908):

"The question thus presented is not a mere question of excessive valuation. The determination of mere questions of value, depending upon fact, is one for the final determination of the special tribunal to which it was submitted, and in the absence of fraud its conclusion may not be assailed by evidence tending to show a less value (citing

authorities). No charge of fraud is made by the bill. The only question, therefore, is whether the law has been substantially pursued by the method of appraisement adopted." See also:

L. & N. R. Co. vs. Bosworth, 230 Fed., 191.

This illegal method of land assessment undoubtedly prevailed in 1912. It had been persistently and continuously followed by Mr. Fischer and his deputies during his entire term as assessor. But, as stated above, land value constitutes the major part of the wealth of the county. The resultant discrimination against the Union Pacific, and others whose properties were assessed by the State Board or the State Tax Commission, was enormous, as the preceding pages have demonstrated.

The statute requires the assessment, not only of tangible properties, but also of all intangible values, particularly as to corporations, and affords the assessor every opportunity to gain the information requisite for such assessment. (Rev. Stat. 1908, secs. 5590, 5591, 5592, 5594; Sess. Laws 1911, p. 255, sec. 2.) The State Board of Equalization and the State Tax Commission were at all times assessing, not only the tangible, but also all of the intangible property of the Union Pacific and other corporations subject to its jurisdiction. But the county assessor, notwithstanding the express requirements of the statute referred to above, consistently, continuously, and persistently failed and refused to assess any such values in his county. This failure was intentional, and with knowl-

edge of the statute. The assessor himself so admits. (Rec., pp. 302, 303, 308, 309.) He made no effort whatever to get intangible values at any time while he was assessor of the county; he did not intend to, and in fact did not, assess anything except tangible property. Obviously this was not only intentional, but was also the adoption of an illegal principle of assessment. As was said by the Supreme Court of the United States in *San Francisco National Bank vs. Dodge,* 197 U. S., 70, at 81:

> "From this analysis it results that in the one case, that of national banks, not only the value of all the tangible property, but also the value of all intangible elements above referred to, is assessed and taxed, whilst in the other case, that of state banks and other moneyed corporations, their property is taxed, but the intangible elements of value which we have indicated are not assessed and taxed, the consequence being to give rise to the discrimination against national banks and in favor of state banks and other moneyed corporations forbidden by the act of Congress."

It admits of no doubt that values to an enormous amount were thus absolutely omitted from assessment. It is equally clear that thereby the plaintiff was discriminated against to its great prejudice.

The statute requires that moneys, notes, and credits, including bank accounts, shall be listed and assessed. (Rev. Stat., sec. 5581.) Bank accounts are to be assessed according to the average for the year,

and the assessor is required to ascertain this and to examine the taxpayer under oath respecting the same. (Rev. Stat., sec. 5610.) Reports under oath are required from the banks, which are made to, and filed with, the assessor. (Rev. Stat., sec. 4756.) From these, and from other sources easily available, the assessor can gain the information relative to bank deposits. No deductions can be made from any such items of property by reason of outstanding indebtedness, unless a detailed list of said indebtedness, under oath, be made and filed with, and preserved by, the assessor. (Rev. Stat., secs. 5584, 5585.) These provisions of the statute were flagrantly violated. There was no real attempt made to ascertain the amount of, or to assess, any of these items of property, which, in a county like Weld, must have been very large. No statement of indebtedness was taken from any taxpayer, and without these, as the assessor himself admits, he had no right to set off indebtedness against credits. By the illegal and improper methods pursued, credits to a great amount, as the assessor admits, must have escaped taxation. (Rec., pp. 300, 301, 334, 346, 347, 272, 273, 281.) As to the utter failure to assess bank accounts, the testimony of the assessor and his deputies is clear. (Rec., pp. 300, 301, 319, 334, 341, 342, 346, 274, 281.)

The statute expressly requires the assessment of moneys invested in merchandise and manufacturing. (Rev. Stat., secs. 5579, 5580.) That no real effort was made to obtain these values is manifest from the evidence referred to above, and from the considerations set forth in the preceding portions of this brief.

The statute expressly requires that a separate assessment shall be made of water rights. (Rev. Stat.,

sec. 5540.) Such rights in Colorado are definite property rights, distinct from any real estate, and are separately sold and dealt in. Therefore, both the Constitution and the statutes require them to be assessed. This the assessor utterly failed to do, although he knew of the requirement of the statute. This he admits himself. (Rec., pp. 305, 306.) Thereby large values escaped.

The Constitution and the statutes authorize an exemption of $200 to be deducted from the personal property of heads of families at its full cash value. The assessor made full deduction after assessing at a fraction of the full value, which fraction defendants claim was one-third and plaintiff claims was one-fifth. Thereby, from the total assessment made by the inadequate, illegal, and improper methods described above, the assessor deducted on account of exemptions at least three times—and, if plaintiff's claim be correct as to the rate of assessment, five times—as much as he should have deducted, thereby enormously decreasing a total assessment theretofore flagrantly and illegally depreciated. We have the assessor's own word that he understood the law in this respect and violated it in 1909, 1910, and 1911. He claims otherwise as to 1912, but the proof overcomes his claim.

We respectfully submit that an assessing officer may not repeatedly, systematically, consistently, and persistently, year after year, violate express provisions of the statute, and then be heard to say in court that he did not intend the necessary results of such violations. We further submit that an assessing officer may not continuously, persistently, and systematically, year after year, fail to employ the

methods which the statutes have placed in his hands and require him to use, and then be heard to say in court that his failure to assess a large part of the property in his county was due to an error of judgment. This assessor knew that he was underassessing his county; that he was undervaluing such property as he did assess, and allowing large amounts of other property to escape; that he was employing illegal methods and wrong principles of assessment, and that, as a result, he was inflicting a great wrong upon plaintiff and other owners of like property, because the matter had been repeatedly brought to his attention, both by the plaintiff, by the State Board of Equalization, by proceedings in court (the justice of which the county officers had conceded), and by the State Tax Commission.

As pointed out above, on April 30, 1912, the assessor expressly admitted, in the presence of the county commissioners, the county attorney, and the county treasurer, that his assessments for the years 1910 and 1911 had been too low (pp. 272, 273, 281). At some time after May 20, 1912, and while the assessor was engaged in making his assessment for 1912, which is here complained of, Mr. Link, a member of the State Tax Commission, in the exercise of the supervisory powers of that commission, was in Weld County investigating the assessment then being made by Mr. Fischer, calling his attention to the fact that it was relatively too low, and relatively lower than that of most of the other counties in the state, and urging him to raise and correct it. He then had several conversations with Mr. Fischer, the assessor, upon the subject, in which the assessor said in effect (p. 256):

"That he was placing lower values in order that Weld county might be protected from paying too much state tax; secondly, that it might not be made to pay a greater per centage of tax than the corporations assessed by the State Board; thirdly, that he had never been provided sufficient help in his county to do the work of his office properly."

About January, 1913, at the conclusion of Mr. Fischer's four years' service as assessor, and just after he had completed his assessment for the year 1912, Mr. Fischer, in conversation with the secretary of the State Tax Commission respecting the new scheme of assessing all property at its full cash value, said that "the present assessor would not reach the full value of the county, and that, in his judgment, approximately the full value of the entire county would be $100,000,000." It can be demonstrated mathematically as has been done in the preceding pages (*supra*, pp. 251, 252), that this was an express admission to the effect that the property which had been locally assessed by Mr. Fischer was assessed at a rate of not to exceed 20 per cent of full value, and, if the assessment by the State Commission had, as plaintiff claims, been upon a one-third basis, at a rate scarcely reaching one-sixth of its actual value. As testified by the secretary of the State Tax Commission (p. 272): "In that conversation Fischer admitted, not in words but by implication, that his assessment was wrong." Mr. Fischer did not deny, but expressly admitted, this conversation with the secretary of the Tax Commission, and reaffirmed the statement that in his judgment the actual value of

the property in the county should approximate $100,000,000. He also in his testimony expressly admitted that, this being so, the property which he had assessed must have been assessed at not to exceed 20 per cent of its actual value (pp. 297, 298).

Upon what has gone before, we respectfully submit that the proof was plenary of system, continuity, and intent. Many a man has been convicted of crime upon less persuasive evidence of intent.

But putting out of view for the moment the attitude, the practice, and the state of mind of the county assessor and his deputies, there is another feature in this case which requires the interposition of equity. As pointed out above, the State Tax Commission had come into existence on May 20, 1912. The statute creating the commission conferred upon it the broadest powers of investigation, supervision, and revision, and placed it in supreme control as to all matters of assessment. (Session Laws 1911, pp. 612 et seq.)

People vs. Pitcher, 56 Colo., 343; 138 Pac., 509.

It was the duty of this commission in the fall of 1912 to do that which it undertook and accomplished in the fall of 1913—i. e., to require the counties, including Weld County, to raise their assessments to a parity with those made by the State Tax Commission, so that the uniformity required by the Constitution might prevail. In the summer of 1912 Mr. Link, at least, and through him doubtless the other members of the commission, knew that the assessment for 1912 in Weld County was relatively very much too low. As we have seen, Mr. Link was in

Weld County during the summer of that year, urging the assessor to raise his assessment. In October, 1912, as the bill alleges without denial, and as the proof shows without dispute, the Union Pacific duly filed its petition with the State Tax Commission, calling attention to the underassessments in Weld County, and asking for a hearing. No hearing was allowed nor action taken by the commission, although the statute under which they were acting expressly required it. (Rec., pp. 14, 17, 29, 214.) And members of the commission now testify that this course was then pursued because (p. 252) the commission had not "at that time been able to investigate all the counties in the state where there are railroads, and therefore we decided not to act on the complaint until we knew more about the situation." And this notwithstanding that the commission did know about the situation in Weld County—to-wit, that the local assessment was relatively lower than the Tax Commission's assessment—and in spite of the fact that the commission then was, or shortly thereafter became, convinced, as they now testify, that the assessment by the assessor was on a basis not exceeding, if it reached, 20 per cent of actual value, whereas that by the commission was on a basis of at least 33 1/3 per cent of actual value (pp. 234, 238, 253, 256, 259, 261, 263). There was, therefore, in the fall of 1912 an absolute failure to act by the State Tax Commission when the circumstances and the knowledge possessed by the commission required action, and the statute commanded it. There was an absolute denial to plaintiff of a hearing, to which under the law it was entitled; and thus, by intentional violation of the law, the State Tax Commission permitted a situation

to continue which they knew, or should have known, would, and which they now know and testify did, result in the discrimination complained of by plaintiff, and in the denial of uniformity in taxation guaranteed by the Colorado Constitution. The situation, therefore, is the same as though the State Tax Commission had itself made both assessments and had, with knowledge of what it was doing and with intent to do it, assessed the property of plaintiff and other like property upon the basis of not less than 33 1/3 per cent of actual value, and assessed the other property in Weld County on a basis of not to exceed 20 per cent of actual value. To say the least, it was an intentional denial to the plaintiff of the equalization to which it was entitled under the Constitution and the statute. It was the equivalent of an assessment by the State Tax Commission which did not in the slightest degree represent the real judgment of the commission, but, on the contrary, was in conflict with its real judgment respecting what the assessment should have been. These circumstances, in the absence of everything else, entitle plaintiff to the relief which it seeks. Under these conditions, no charge of fraud in the bill, and no showing of fraud in the proof, was necessary.

Railroad and Telephone Companies vs. Board of Equalizers, 85 Fed., 302, 305, 306.

Chicago Union Traction Co. vs. State Board of Equalization, 114 Fed., 557, 566.

Raymond vs. Chicago Union Traction Co., 207 U. S., 20, 36, 37.

Taylor vs. Louisville & Nashville, 88 Fed., 350, 374.

Louisville & Nashville vs. Bosworth, 209 Fed., 380, 454.

Louisville & Nashville vs. Bosworth, 230 Fed., 191.

III.

THE COURT ERRED IN DENYING PRELIMINARY INJUNCTIVE RELIEF.

This case was not in either of the lower courts, nor is it here, upon final hearing. The application was and is for relief interlocutory in character. A temporary injunction was and is sought, merely to maintain the status quo until upon a full hearing the rights of the parties may be ultimately determined. The rule of decision applicable under such circumstances is altogether different from that which applies and controls at the final hearing.

Upon such an application, "the court concerns itself more particularly with what may be called the external situation. * * * The class of cases in which the preliminary injunction will be more readily granted is that where the purpose of the injunction is to maintain the status quo until the controverted right is determined."

3 Street's Fed. Eq. Pr., secs. 2338 and 2350.

In *Harriman vs. Northern Securities Co.*, 132 Fed., 464, the question is fully discussed, with cita-

tion of many authorities. Among other things, the court says (p. 476):

> "The balance of convenience or hardship ordinarily is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or to the law of the case, or to both. * * * Where, however, the sole object for which an injunction is sought is the preservation of a fund in controversy, or the maintenance of the status quo until the question of right between the parties can be decided on final hearing, the injunction properly may be allowed, although there may be serious doubt of the ultimate success of the complainant. Its allowance in the latter case is a provisional measure of suspensive effect, and in aid of such relief, if any, as may be finally decreed to the complainant."

In the Eighth Circuit the rule is well settled.

In *St. Paul etc. Ry. Co. vs. Northern Pacific*, 49 Fed., 306, the Circuit Court of Appeals said (p. 308):

> "Counsel for appellant has discussed at length the ultimate question necessary to be decided upon the final hearing, to-wit, to which company do the lands belong, which question includes the construction to be placed upon the several acts of congress under which the parties claim, and the effect to be given to the action of the land department,

and other like matters. It cannot be expected that upon a hearing of an application for a temporary injunction either the circuit court, or this court, upon appeal, will enter upon a full hearing of the question upon which the ultimate rights of the opposing parties may be dependent. If it appears from the showing made that the title to the land or property is in dispute, and that the complainant is in good faith seeking to settle such dispute, that is as far as it is necessary for the court to inquire, so far as that particular point is involved, when asked to issue an injunction such as the one issued in the present proceeding; and therefore we do not enter upon a consideration of the questions which were so fully presented in argument of counsel, but which more properly belong to the final hearing of the cause upon the merits."

In *Allison vs. Corson,* 88 Fed., 981, the same court reversed an order refusing a preliminary injunction, and, speaking through His Honor, Judge Sanborn, said (p. 584):

"The controlling reason for the existence of the right to issue a temporary injunction is that the court may thereby prevent such a change of conditions and relations of persons and property during a litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. Undoubtedly an injunction ought not to be issued unless substantial questions of law or fact, whose deci-

sion in favor of the moving party would entitle him to ultimate relief, are presented. If it is reasonably clear that he cannot ultimately succeed,—if his pleading discloses no cause of action or defense,—no injunction should be granted. But if the questions to be ultimately settled are serious and doubtful, and if the injury to the moving party will be certain, great, and irreparable if the motion is denied and the final decision is in his favor, while, if the decision is otherwise, the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted, *it is the duty of the chancellor to issue it.* A preliminary injunction, maintaining the status quo, may properly issue whenever the question of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted." (Citing many authorities.) (Italics ours.)

The same doctrine has been repeatedly enunciated and applied:

City of Newton vs. Levis, 79 Fed., 715, 718.

D. & R. G. vs. U. S., 124 Fed., 156, 161.

Colorado Eastern vs. C. B. & Q., 141 Fed., 898, 900.

From the foregoing authorities we deduce the conclusion that, if what has been called the "balance of convenience or inconvenience" be in favor of the plaintiff, and if, further, it is made to appear that there is a substantial controversy between plaintiff and defendant, that plaintiff's claim is advanced in good faith and does not appear to be entirely without merit, the temporary writ of injunction should issue. Unless there be some insuperable objection to the maintenance of the plaintiff's bill or to the grant to plaintiff of the relief prayed, or of any relief within the scope of the bill, the duty of the court in such a case as this requires the maintenance of the *status quo* until final hearing can be had.

Not only this, but upon application for temporary injunction the rules pertaining to the quantum and quality of the proof are radically different from those which govern the court's action at the final hearing. Upon motions for temporary injunctions, the ordinary rules of evidence do not obtain, and upon such motions hearsay and other forms of evidence, which would not be competent upon a trial upon the merits, may be considered.

Mathews vs. Ironclad Mfg. Co., 19 Fed., 321; citing Buck vs. Hermance, 1 Blatchf., 322.

Great Western Ry. Co. vs. D. & O. J. Ry. Co., 2 Phil. Ch., 597.

Casey vs. Cincinnati Union, 45 Fed., 135-147.

Shea vs. Nilima, 133 Fed., 209, 216.

Ford vs. Taylor, 140 Fed., 356.

McCarthy vs. Bunker Hill M. & S., 147 Fed., 981.

Coeur d'Alene C. & M. Co. vs. Miners' Union, 51 Fed., 260, 263.

Mercantile Trust Co. vs. Texas & P. Ry. Co., 51 Fed., 529, 542.

In *Coeur d'Alene C. & M. Co. vs. Miners' Union, supra,* it appeared that the governor by proclamation declared that it had come to his knowledge that combinations of men were conspiring for unlawful purposes; that property of citizens was being jeopardized, citizens terrorized, and the laws set at naught, etc. With reference to the admission as evidence of this proclamation of the governor upon an application for temporary injunction, the court said:

> "As such proclamation is a public document, and is also made a part of the record in this case, and from the known integrity, the dispassionate judgment, and the impartial character of his excellency, its statements are entitled to the highest respect."

Mercantile Trust Co. vs. Texas & P. Ry. Co., supra, was an action to restrain the Railroad Commission of Texas from putting certain rates into effect in accordance with the provisions of the Railroad Commission Act of Texas. It was urged by complainant that a certain section of said act did not provide due process of law, and that another section was unconstitutional. The answer of respondent to this contention was that, even without the alleged unconstitutional section, the commission law and

the work of the commission might still stand, and the complainants be without legal ground for the relief they sought. With regard to this contention the court said:

> "This, however, is wholly inconsistent with the position assumed by the leading advocates of the commission in their public addresses to the people in the canvass now pending in Texas, of which, on a hearing in chambers, I may be permitted that far to take judicial notice. In at least one public address, his excellency, our present governor, in discussing the subject of the Texas Commission, and especially section 5 of the railroad commission law, certainly said in substance, with zeal and warmth and telling iteration, that section 5 was the heart of this law, and it and its related section the life of the Texas railroad commission."

Beyond question, the rules established by the foregoing authorities are that, upon application for temporary injunction, in the absence of some insurmountable obstacle, such as that the bill does not, and in view of admitted facts cannot, state a cause of action, it is only necessary for the plaintiff to make such showing as will indicate to the court that matters are presented which are worthy of further investigation and consideration. Such showing may be made by evidence which would not be admissible upon the final hearing. Indeed, it may arise from knowledge which the court already possesses and which has not been gained from evidence adduced at the hearing. If issues of fact arise upon conflicting showings, the

court need not, indeed should not, make any findings thereon. The question is not whether upon such issues the plaintiff has by a preponderance of the evidence sustained the burden of proof which rests upon him. Such is the question presented upon the final hearing. But upon the preliminary hearing it is only necessary for plaintiff to show that he has a justiciable claim, which is advanced in good faith; that such claim is not totally lacking in merit; that it is not clear beyond reasonable doubt that he will ultimately be defeated thereon, and that, even though upon the preliminary hearing the evidence preponderate against him, it is, nevertheless, reasonably possible that upon the final hearing he may succeed.

Unquestionably the allegations of the bill make a case upon which the taxes complained of are invalid. By repeated decisions, this court, and other federal courts, have declared such discrimination as is here charged to be unlawful, and have relieved against the result thereof.

We have demonstrated, we submit, that equity has jurisdiction.

Upon the evidence, the showing was sufficiently complete and convincing to entitle the Railroad Company to relief upon final hearing. But, of course, the cause was not upon final hearing. The application was merely for a preliminary injunction, to maintain the *status quo* until the charges made could be thoroughly investigated and proper final relief administered after full hearing. The rules applicable to such a preliminary hearing have been many times stated, and are well understood. Upon the preliminary application it was neither the duty nor the right of the court to make findings upon the issues tendered;

that could be done only after complete investigation, according to the deliberate methods of courts of equity, and a full and final hearing. Upon these issues of fact, the evidence at the hearing, to say the least, greatly preponderated in plaintiff's favor. It clearly indicated a condition of affairs which merited and required further and fuller investigation. We think it conclusively established the existence of the unlawful discrimination complained of, and to the extent claimed. It admits of no doubt, we think, that "substantial questions of law or fact, whose decision in favor of the moving party would entitle him to ultimate relief," were presented. This being true, why should not the preliminary injunction, to maintain the *status quo* until final hearing, be issued?

That "the injury to the moving party will be certain, great and irreparable if the motion is denied" admits of no doubt. Suffice it to say, that a denial of the temporary injunction will, as defendants admit and aver, result in the immediate collection of the tax, which will at once terminate this particular suit, deprive the plaintiff of final hearing herein, render any final relief which could be afforded in this case quite nugatory, and drive the plaintiff to other supposed remedies, which it is sincerely believed do not exist at all, and which, if they have any existence, are doubtful, vague and elusive, involve a great multiplicity of suits, give no promise of a just result, and make it certain that plaintiff could never recover and collect the more than forty thousand dollars which it would be required to expend. In short, if the temporary injunction be denied, plaintiff's money will be gone, plaintiff will have been refused a hearing upon the question of illegality of the tax, and this suit will

have been forthwith terminated. On the other hand, if the injunction is granted and the final decision be in favor of defendants, the inconvenience and loss to the defendants will be inconsiderable, and may well be indemnified by a proper bond. Plaintiff Railroad Company has already paid to the county treasurer $46,691.04, the amount of these taxes which it concedes to be due, and withholds $31,127.37, the amount which is illegal and excessive, if plaintiff's claim of discrimination be ultimately sustained. Plaintiff (appellant here) was and is a perfectly solvent corporation. In addition, it is able and willing to give a bond, as it did upon the restraining order now in force, sufficient in amount and ample in security to insure the payment of the sum withheld in case the final decision should be against the plaintiff. There is, therefore, no possible chance of loss or even inconvenience to the defendants if the injunction be issued, even if the final decision be in their favor.

Moreover, by section 129 of the Judicial Code, plaintiff is entitled as of right to an appeal from an order denying the application for preliminary injunction, and a review by an appellate court of the grounds upon which the application is put. So far, this right has been utterly denied it. The Circuit Court of Appeals did not at all pass upon the merit of its application for injunction. If, as we earnestly contend, the Circuit Court of Appeals was wrong in denying equity jurisdiction, then it is plain that plaintiff has been and will be denied its statutory right to a review by an appellate court of its application for preliminary injunction, unless this court now assumes jurisdiction thereof and considers and passes upon the same.

Not only this, but as matters have shaped themselves, the determination of the Circuit Court of Appeals against equity jurisdiction, if wrong, can never be reversed or reconsidered, and therefore the merit of the application for preliminary injunction will never receive the consideration of an appellate court, unless this court now assumes jurisdiction.

Metropolitan Water Co. vs. Kaw Valley Drainage District, 223 U. S., 519, 520, 523, 524.

Brown vs. Alton Water Co., 222 U. S., 325.

And finally, even though the determination of the Circuit Court of Appeals as to equity jurisdiction be not conclusive, but in some manner subject to subsequent review after final decree, it does not admit of doubt that unless this court now grants relief, the denial of preliminary injunctive relief will be effective, and long before final hearing and final decree can be had in the trial court the collecting officers will, by application of the drastic processes authorized and required by the Colorado statutes, have collected all of the taxes in dispute, thus rendering the case moot, and final relief nugatory, and subjecting appellant (plaintiff below) to all of the wrongs from which it is here sought to be relieved. Such a situation would be intolerable, and, we think, abhorrent, to equity.

The force of this and like considerations was apparent to the learned trial judge. Moved by them, although he had denied the temporary injunction, he issued a restraining order, to remain in effect pending the appeal to the Circuit Court of Appeals. The latter court also, evidently moved by like considerations, although denying equity jurisdiction, and in

effect directing dismissal of the bill, ordered that said restraining order remain in effect pending proceedings for review by this court.

Obviously, this was done upon the theory that under the Act of Congress plaintiff had a statutory right to appeal, which would have been rendered nugatory without the restraining order. But plaintiff had at least as much right to a final hearing in the trial court, and an appeal from the final decree if it should be adverse. We respectfully submit that the very same considerations which moved the trial court to issue the restraining order mentioned above, and which moved the Circuit Court of Appeals to continue it in effect, require the issuance of the temporary injunction.

A like situation was considered by the Circuit Court of Appeals in Allison vs. Corson, 88 Fed., 581. There the trial court denied the application for temporary injunction, but continued in effect a restraining order pending appeal from such denial. Upon that point the court, speaking through His Honor Judge Sanborn, said (page 584):

> "When the appeal was taken the court below properly continued the restraining order in force until the questions it presents could be decided by this court. The same considerations which led to this wise exercise of its discretion might well have induced that court to hold matters in statu quo, by the issue of the injunction, until a final hearing and decision of the case could be reached. No substantial loss or inconvenience would have been entailed upon the appellees by the allowance of the writ. Why,

then, should not the injunction have been issued? Why should not the rights of these parties have been held where they were, without loss to any one, until the final hearing?"

The court answered the questions which it thus propounded by holding that the temporary injunction should have been issued, and by reversing the action of the trial court in refusing it. Why should not the same answers be made to the like questions propounded upon this record?

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 108.

(24670)

UNION PACIFIC RAILROAD COMPANY,
APPELANT AND PETITIONER,

VS.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO, W. R. PATTERSON, as County Treasurer of Said County, and S. J. McAFEE, as Sheriff of Said County,

APPELLEES AND RESPONDENTS.

Appeal from and Petition for Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR APPELLEES AND RESPONDENTS.

I.

NATURE OF CASE.

Like appellant, we term it plaintiff, and appellees defendants.

Plaintiff contends, and defendants deny, that ap-

pellant's property, in the taxation for 1912 in Weld County, Colorado, was duly burdened.

On the application for preliminary injunction, upon the issue joined upon complaint of plaintiff and answer of defendants, a full and extended hearing was had, consuming more than ten days, where there were introduced affidavits and documentary and oral evidence, at the termination of which, after full arguments of counsel, the court, in its discretion, upon said pleadings, the evidence introduced by both parties, and the law of the case, denied the writ.

The decision of the trial court in favor of defendants was upon both law and fact; as shown by the record of the order denying the temporary injunction, at the close of the extended hearing; (Rec. 183), viz:

> "This cause came on to be heard at this term upon the application of the plaintiff for an injunction, and was argued by counsel,
> * * * * *
> "And thereupon, on consideration thereof, it is ordered by the court that said motion be, and the same is hereby, denied."

This was the only decision of the trial court. It sustained the contention of the defendants both as to the law and the facts.

Defendants Position.

The defendants have at all times contended and still maintain:

First: That under the proof the plaintiff was not entitled to injunctive relief, even tho a cause of equitable cognizance was stated in the bill.

Second: That from the pleadings and proof it appears there is no equitable jurisdiction, because, for the injuries complained of there was afforded to plaintiff a plain, speedy and adequate remedy at law.

The trial court in effect held in favor of defendants upon both points, and the Circuit Court of Appeals affirmed this decision upon the ground that, as there was an adequate reemdy at law under the facts of this case, there was no equitable jurisdiction and the injunction was rightly refused.

The opinion of the Circuit Court, tho without comment upon the evidence, is based thereon, relates thereto and declares, in upholding the trial court, that on the facts complained of there was amply remedy at law.

This decision of the Circuit Court of Appeals affirming the decision of the trial court is final, and this court is without jurisdiction to review on appeal, and there exists no reason extraordinary or otherwise, for the interposition of this court by certiorari.

II.

CIRCUIT COURT OF APPEALS IS TRIBUNAL OF LAST RESORT.

The decision of the Circuit Court of Appeals is final. It cannot be reviewed here on appeal. There is no reason to review it by certiorari.

That this Court is without jurisdiction to consider this cause upon appeal or error, (as recognized by the application for certiorari), is manifest from the provisions of the Judicial Code and the declarations of this Court in consideration of them, as we now proceed to demonstrate:

Section 128 of the Judicial Code provides:

> "The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts * * * in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court as provided in section two hundred thirty-eight, * * * and except as provided in sections two hundred and thirty-nine and two hundred forty, the judgment and decrees of the Circuits Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite party to the suit or controversy, being * * * citizens of ~~the~~ different states." (36 Stat. L. 1133).

Section 238 describes cases in which appeals and writs of error may be taken to the Supreme Court direct and is exclusive of the class of cases to which this belongs.

Section 239 concerns only the certification of questions or propositions of law by the Circuit Court of Appeals unto this Court.

Section 240 empowers this Court to require by certiorari that the record in a case decided in any Circuit Court be brought here for review, in any case where the gravity or importance of the situation requires.

The case at bar in no manner involves a dispute or controversy affecting the construction of the constitution or laws of the United States.

III.

NO CONSTITUTIONAL QUESTION.

The case at bar effects only the question of whether or not the property of the plaintiff has been unduly burdened with tax contrary to the provisions of the constitution of the State of Colorado requiring all taxes to be uniform. This involves a question of fact under a principle protected by the Colorado and Federal constitutions, which both litigants concede. Therefore, there is no contention as to the provisions of the constitution of Colorado or the Nation, nor as to the effect theref. It is conceded the constitution of Colorado requires equality of burden. If a tax-payer is required to pay more than his rightful portion of taxes he is injured, and may have relief, but the question as to the relief is one of fact and in no manner requires any construction or interpretation of the well known and benign principle of equality protected by the State and Federal constitutions, and here admitted by all parties litigant.

No Reason for Certiorari.

This case is not one which under any of the sanctioned reasons therefor presents a cause for review by this Court under certiorari.

The writ of certiorari for review of the decisions of the Circuit Court of Appeals of causes which by the law are there to be finally determined, for manifest reasons, should be exercised only where necessity exists in order to conserve the policy of the law which brought these Appellate Courts into existence.

This Court has held that the power of the Court

by this supervisory review extends to every case pending in any Circuit Court of Appeals, provided the cause is one which, but for the statutory provision concerning certiorari would be finally determined in the Circuit Court of Appeals.

The Court has also held that while the power is as extensive as the necessity may be, and sufficient to accord to this Court final control over the litigation in all Courts of Appeals, it will be sparingly exercised, and indulged only when the circumstances of the case demonstrate that the importance of the question involved, or the necessity of preventing conflict between two or more Courts of Appeals, or Courts of Appeals and Courts of a State, or some matter effecting the interests of this Nation in its internal or external relations, demands the exercise of the power.

The principles by which this Court has been guided in the exercise of this supervisory control are well set forth in the opinion of Mr. Justice Brewer in Forsythe vs. Hammond, 166 U. S. 506, from which we excerpt the following language here pertinent:

> "This question of power has, indeed, already been decided by this Court in prior cases (American Const. Co. v. Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 383 (38; 486, 491); United States v. The Three Friends, 166 U. S. 1 (ante, 897), but as it has again been discussed by counsel, a brief reference to those cases and the reasons therein stated may not be inappropriate. Up to the time of the passage of the act of 1891, creating the Circuit Courts of Appeal, the theory of

Federal jurisprudence had been, a single Appellate Court, to-wit: the Supreme Court of the United States, by which a final review of all cases of which the lower Federal Courts had jurisdiction was to be made. It is true there existed certain limitations upon the right of appeal and review, based on the amount in controversy and other considerations; but such limitations did not recognize or provide for the existence of another Appellate Court, and did not conflict with the thought that this Court was to be the single tribunal for reviewing all cases and questions of a Federal nature. The rapid growth of the country and the enormous amount of litigation involving questions of a Federal character so added to the number of cases brought here for review that it was impossible for this Court to keep pace with the growing docket. The situation had become one of great peril, and many plans for relief were suggested and discussed.

The outcome was the act of March 3, 1891, (26 Stat. at L. 826, chap. 517) the thought of which was the creation in each of the nine circuits of an appellate tribunal composed of three judges, whose decision in certain classes of cases appealable thereto should be final. McLish v. Roff, 141 U. S. 661, 666 (35:893, 895). While this division of appellate power was the means adopted to reduce the accumulation of business in this Court,

it was foreseen that injurious results might follow if an absolute finality of determination was given to the Courts of Appeal. Nine separate appellate tribunals might by their differences of opinion, unless held in check by the reviewing power of this Court, create an unfortunate confusion in respect to the rules of Federal decision. As the Courts of Appeal would often be constituted of two Circuit Judges and one District Judge, a division of opinion between the former might result in a final judgment where the opinions of two Judges of equal rank were on each side of the questions involved. Cases of a class in which finality of decision was given to the Circuit Courts of Appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there was placed in the act creating the Courts of Appeal, in addition to other provisions for review by this Court, this enactment:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and

determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

The general language of this clause is noticeable. It applies to every case in which but for it the decision of the Circuit Court of Appeals would be absolutely final, and authorizes this Court to bring before it for review and determination the case so pending in the Circuit Court of Appeals, and to exercise all the power and authority over it which this Court would have, in any case, brought to it by appeal or writ of error. Unquestionably, the generality of this provision was not a mere matter of accident. It expressed the thought of Congress distinctly and clearly, and was intended to vest in this Court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the Court of Appeals. It may be exercised before or after any decision by that Court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the Circuit Court of Appeals, and of those classes of cases in which the decision of that Court is declared a finality, and this Court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination. Obviously, a power so broad and comprehensive, if care-

lessly exercised, might defeat the very thought and purpose of the act creating the Courts of Appeal. So exercised it might burden the docket of this Court with cases which it was the intent of Congress to terminate in the Courts of Appeal, and which, brought here, would simply prevent that promptness of decisions which in all judicial actions is one of the elements of justice.

So it has been that this Court, while not doubting its power, has been chary of action in respect to certioraris. It has said: * * * "It is evident that it is solely questions of gravity and importance that the Circuit Courts of Appeals should certify to us for instruction; and that it is only when such questions are involved that the power of this Court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked." Ex parte Lau Ow Bew, 141 U. S. 583, 587 (35: 868, 870); Ex parte Woods, 143 U. S. 202 (36: 125); Lau Ow Bew v. United States, 144 U. S. 47, 58 (36:340, 344); American Const. Co. v. Jacksonville, T. & K. W. R. Co., 148 U. S. 372, 383 (37:486, 491).

We have declined to issue writs of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the Court of Appeals. Chicago & N. W. R. Co. v. Osborne, 146 U. S. 354 (36:1002). On the other hand, in United

States v. The Three Friends, at the present term, 166 U. S. 1 (ante, 897), we issued a write of certiorari in a case appealed to the Circuit Court of Appeals before any action had been taken by that Court; but this was in view of the fact that the question involved was one affecting the relation of this country to foreign nations, and therefore one whose prompt decision by this Court was of importance, not merely for the guidance of the executive department of the government, but also to disclose to each citizen the limits beyond which he might not go in interfering in the affairs of another nation without violating the laws of this.

We affirm in this case the propositions heretofore announced, to-wit: that the power of this Court in certiorari extends to every case pending in the Circuit Court of Appeal, and may be exercised at any time during such pendency, provided the case is one which but for this provision of the statute would be finally determined in that Court. And further, that while this power is coextensive with all possible necessities and sufficient to secure to this Court a final control over the litigation in all the Courts of Appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict be-

> tween two or more Courts of Appeal, or between Courts of Appeal and the Courts of a State, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

The case at bar is one wherein the jurisdiction of the Federal Courts is dependent solely upon the fact of diversity of citizenship, the plaintiff being a corporation of the State of Utah, and the defendents officials of Weld County in the State of Colorado; and although in the bill it is contended that by inequality of tax burden impressed upon property of the petioner as compared with that imposed upon others in Weld County for the year 1912, the petitioner, if cempelled to pay the taxes levied under the assessment fixed, would be deprived of that uniformity of tax burden guaranteed by the constitution of Colorado, and deprived of its property without legal process and denied the equal protection of the law, as guaranteed by the federal constitution, no question concerning the construction of either constitution or any of the provisions thereof was raised.

We, therefore, respectfully maintain that the decision of the Circuit Court of Appeals is not reviewable by this Court on writ of error, or by appeal, nor should it be disturbed by certiorari unless such review be necessary because of the existence of some one of the extraordinary and important reasons announced by Mr. Justice Brewer above set forth, none of which are present.

The sole ground of petitioner, urged to the Court to review by certiorari this final decision of the Circuilt Court of Appeals, is that the decision is in conflict with the judicial announcements made by Circuit Courts of Appeal other than that of the Eighth Circuit, the decisions of this Court and of the Courts of Colorado, and, as incidental thereto, that the decision is destructive of the equity jurisdiction of the Courts of the United States.

In support of this contention counsel for petitioner assert a false premise, and therefrom, by extended argument, lead to an erroneous conclusion, the fallacy of which is at once apparent upon consideration of the facts and law before the Trial Court, and the decision upon the law of the case announced by the Circuit Court of Appeals.

That the decision of the Trial Court and Circuit Court of Appeals are not in conflict but in consonance with the decisions of the Courts of Colorado, the Circuit Court of Appeals, and this Court, we refer to the authorities cited in support of the principal points of this brief, and in particular call the Court's attention to the fact that since the decision of the Circuit Court of Appeals, and its reaffirmance upon rehearing, that decision has been considered by the Supreme Court of Colorado, and expressly approved in the case of Nile District vs. English, 60 Colo., 406, wherein, on the subject of construction of Sec. 5750 R. S. 1908, the Supreme Court of Colorado again asserts that there is afforded thereby a complete remedy to aggrieved taxpayers, and wherein the Colorado Court again ex-

presses in line with its continued and uniform position that it is under most exceptional and unusual circumstances, only, that a case can arise to restrain collection of taxes wherein equity ought to take cognizance.

The language of the Court upon this point, is so clearly pertinent on this subject of variance of judicial holding, and in establishing the fact that the Courts of Colorado have not changed and that the Circuit Court of Appeals in its decision is in consonance therewith, that we call this Court's attention particularly to the language of Mr. Justice Bailey in that case appearing at page 44 of this brief, *infra*.

From the language of Mr. Justice Bailey it is established beyond refutation that the long line of Colorado decisions holding the Colorado Statute to afford a speedy and adequate remedy, such as to preclude the interposition of equity, (except in cases where the law is inadequate to afford relief) is unbroken, and that the decision in this case by the Circuit Court of Appeals is in absolute harmony therewith; and that, any decision in this case contrary to the doctrine announced by the Circuit Court of Appeals and approved by the Supreme Court of Colorado, would be subject to the very criticism of *non-uniformity* which the plaintiff has made the false basis of its appeal to this Court for exercise of the extra-ordinary writ of ~~cer~~ certiorari.

We therefore earnestly maintain that the decision of the Circuit Court of Appeals is final, and there is no reason to disturb it and we respectfully refer this Court to the brief filed in opposition to the petition for certiorari.

IV.

Questions If Review Allowed.

If it be determined by this Court that the decision of the trial Court and Circuit Court of Appeals should be reviewed under certiorari, or otherwise, the decisions of both lower courts being correct must be sustained both upon the matters of law and the questions of fact.

The trial court and the Circuit Court of Appeals refusing the writ of injunction supports the position of defendants to effect that under the pleadings and evidence the plaintiff was not entitled to relief.

A review of these decisions involves consideration of the following:

1. Did plaintiff have a remedy at law?
2. If there was a legal remedy, did the court err, in view of the evidence, in refusing the writ?

If there was a legal remedy, or if there was no legal remedy and under the evidence the Court did not abuse its discretion in refusing the writ, the judgment must be affirmed.

We shall consider these questions in the order stated.

ARGUMENT.

V.

PLAINTIFF HAD LEGAL REMEDY.

The plaintiff had a full, speedy, and adequate remedy at law.

The statutes of Colorado afford an ample remedy for the protection of any taxpayer having a grievance of the nature described in the bill.

The legal remedy afforded in all cases (except where special circumstances require equity's assistance for protection) is clearly defined by the statutes of Colorado, upheld by its Courts of last resort, and by the decisions of the Courts of the United States.

This statutory remedy is a part of the revenue law of Colorado, designed and intended for the protection of the taxpayer and the public revenues from injunctive interference, and is based upon the theory that the legislative function of collecting taxes and carrying on state, county, and municipal government is not to be interfered with by boards, tribunals, or officers other than those constituted by law for that purpose.

The revenue laws of the state consist of extended constitutional and statutory declarations, designed and intended (tho valuations and assessments are made by different boards, officials, and assessing tribunals, under different rules and methods) to secure for the necessity of government the required revenue by an equality of burden upon all the value on which the same is imposed. This purpose, tho expressed in different enactments and sought to be insured in different ways, runs clear and manifest thruout the whole code and system, and is, perhaps, nowhere better expressed than in the constitutional declaration that—

> "All taxes shall be uniform upon the same class of subjects, within the territorial

> limits of the authority levying the tax and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal." (Const. Colo., Art. X, sec. 3.)

For assistance in enforcement of this benign principle of equality of tax burden, many methods of ascertainment of value and impression of burden are devised to protect the taxpayer against unjust and unequal payment.

Remedies are established within the law itself, designed to assure the taxpayer of equality, and the state of protection from interference with the collection of the revenues necessary to its existence.

The statute of Colorado requires that the taxpayer pay the tax, that the functions of government may be discharged and not embarrassed, and affords to the payer a full adequate, and speedy remedy for relief, if he has a claim of merit. This statutory provision has been long in force in the state, often considered by the Colorado Courts, as well as by Courts of the United States, and has always been held to afford sufficient relief, by a *full, adequate, and speedy remedy at law*, to an aggrieved taxpayer, (except in those instances where, because of some peculiar circumstance or condition, resort to equity is necessary to protect the payer of the tax).

The statute at the time of the hearing of the evidence whereon the writ of injunction was refused is

section 5750, Revised Statutes of Colorado, 1908, and reads as follows:

> "Each county is responsible to the state for the full amount of tax levied for state purposes excepting such amounts as are certified to be unavailable, double or erroneous assessments, as provided in this act, and all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be *erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer.*" (Italics ours.)

Under the above section the plaintiff could have paid its taxes as any other taxpayer, and have applied for the refund or the rebate described; and if either the same was refused by the board of county commissioners, or approval denied by the State Tax Commission, or from either or both causes, the plaintiff could have appealed in an action at law, asserting his pretended grievance, and, if meritorious, obtain full redress in one suit and proceeding against the County of Weld, without interfering with the public revenues necessary to be employed in the discharge, by officers, of the public trust of governmental affairs.

The statute providing for the appeal in cases of refusal to an aggrieved taxpayer for refund or rebate is

section 1225 of the Revised Statutes, 1908, and reads as follows:

> "When any claim of any person against a county shall be disallowed, in whole or in part, by the board of commissioners, such person may appeal from the decision of such board to the district court for the same county, by causing a written notice of such appeal to be served on the clerk of such board within thirty days after the making of such decision, and executing a bond to such county, with sufficient security, to be approved by the clerk of said board, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant."

The right of appeal is not denied; it existed in the statute prior to the creation of the Tax Commission, and still stands. Where any tax payment is made in excses of that which is equitable under the Colorado law and Constitution, the right of appeal is clear, for it states that in exery such instance the board shall give a refund; and, moreover, this is not interfered with, for if there should be non-approval by the Tax Commission, this in no way affects the right of appeal from the decision provided for in said section 5750, *supra*, the method of which is clearly prescribed by section 1225, *supra*, long heretofore and still in force.

The statute according the rebate or refund has been in force since 1870, though there was added to it,

in 1902, a declaration that each county is responsible to the state for the full amount of state taxes, except such amount as is unavailable, double, or erroneous, as provided in the act of 1902.

This addition in no manner modifies or abrogates the remedy for recovery of illegal or erroneous tax by which the payer was insured by the statute as it existed at the time of the adoption of the act of 1902, when the same was re-enacted, and as it still exists.

The portion of the statute of 1902 which has been the law of Colorado since 1870 has never been repealed by expression or implication; on the contrary, it was the law when the act of 1902 was adopted, and, not being modified by any expression or implication, is still the law, and all interpretations of the statute are as cogent now as when enacted. The responsibility of the county unto the state for state revenues existed before the enactment of 1902, just the same as since, and how the mere statutory declaration of this fact could modify the liability which has existed since 1870, and was simply reiterated in the expression of the legislature in 1902, is impossible to understand; in fact, it cannot be.

The statute of 1902 demanding the rebate, just the same as that of 1870, declares that "in all cases * * * the county commissioners shall refund without abatement or discount to the taxpayer." If the declaration of this principle in 1902, abrogated the preceding declaration, it re-established the same principle at the same instant it destroyed the former statute. If the statute of 1902 is something different from that previously enacted because of the added lan-

guage, then the former act is still in force; for there is no hint of any character of repeal of the former act, and the latter is in no manner in conflict with the former law. Repeals by implication are not favored, and it would be a strange doctrine, indeed, to hold that where a principle is announced in a statutory enactment, which principle has long existed, and been often interpreted and upheld, not only by the highest courts of the state, but by those of the United States, to say that, because the statute was re-enacted in identically the same words, and some other statute was enacted at the same time, the principle so long established, recognized, and upheld, was modified because again announced, and this to the result of destruction of one of the assurances that taxes shall be uniformly impressed upon property values.

Clearly, the remedy defined in the statute of 1870, and again announced in the enactment of 1902, is for the purpose of protecting the taxpayer against unequal taxation, as guaranteed by the Constitution.

To deny this legal remedy would deny to the taxpayer the opportunity to obtain any redress by application to the county commissioners, and relegate him to the single remedy of a suit in equity to obtain relief.

If this anomalous construction be correct, no taxpayer who had paid a tax erroneously or illegally assessed, or collected, could recover any rebate by action of the commissioners, whether approved by the Tax Commission or not, and the result would be that the refund or rebate now permissible to be made by the county commissioners for correction of such errors, without any suit, where the constitutional requirements has

been violated, would no longer exist; for there could be no relief afforded by the board of county commissioners, whether approved or disapproved by the State Tax Commission, and the result of which would be the destruction of a statutory provision, long extant and often upheld, clearly enacted for the purpose of protection of equality of taxation, preventing all opportunity of relief, except in courts of equity, and tend to increase the burden of these tribunals with the functions of assessment, collection, and equalization in taxation, at war with the whole policy of the law to retain that function under the control of boards and officers designed, created, and qualified for that purpose.

VI.

COLORADO STATUTE AFFORDS RELIEF.

The statute of Colorado that accords in all cases where any person shall pay any tax, interest, or costs, that shall thereafter be found erroneous or illegal, whether owing to erroneous assessment, or improper or irregular levying of the tax, or other errors or irregularities, the right to a refund, without abatement or discount, affords a remedy at law that is full, speedy, and complete, as has been often held by the Supreme Court of Colorado, and by the courts of the United States; and this remedy at law is such as to exclude resort to equity, except in such cases as, because of the peculiar circumstances thereof, preclude full relief under the statute.

Price et ai. vs. Kramer et al., 4 Colo., 546.

Woodward vs. Ellsworth, 4 Colo., 580.
Hallett vs. Arapahoe County, 40 Colo., 308.
Bent County vs. Santa Fe R. R. Co., 52 Colo. 609.

Tallon vs. Vindicator Co. 59 Colo., 316.
Nile District vs. English 60 Colo., 406.
Singer Sew Mch. Co. vs. Benedict, 229 U. S., 481.

The reasoning of the above cases does not assert, nor do we contend, that although this remedy at law exists, no case can arise where equity will intervene to protect a taxpayer so environed that injunctive relief is required for the full preservation of his rights; but these exceptions are few, and the case at bar presents no circumstances to make it such or to take it away from the usual rule.

The cases of exception where injunctive relief is necessary to protect the taxpayer are such as where property exempt from taxation has been taxed, or where, if the taxpayer pays the tax, as a trustee, or agent, for a number of persons, he would be required to bring a large number of suits for his reimbursement, such as the facts in Cummings vs. Natl. Bank, 101 U. S., 153, and the like.

The case at bar is like the cases above cited, wherein it was held that there was adequate remedy at law. There is required but one suit in case a refund be denied. That suit is against the board of county commissioners, and, if the claim be meritorious, a judgment is had against the county, and the same is paid by the

county by a levy upon all of the property of that county subject to taxation. No other method could be pursued. In the case at bar, as often happens, the erroneous tax (so claimed) is upon property located in several subdivisions of the county, and likewise is collected for state, so-called county, and other purposes, such as school districts, cities, towns, and other taxing districts. To correct the error, if error there be, in justice the burden must be borne, as is the clear contemplation of the statute in question, by the several divisions and taxing districts of the county which had received the excessive benefit. That this theory is correct, and this policy and practice has been pursued, is manifest from the decisions of the Supreme Court of Colorado, as well as of the United States, above set forth.

It must be borne in mind, as we will hereafter demonstrate, that courts of equity are slow by injunctive action to interfere with the necessary collections of revenues by the constituted authorities, and many of the citations urged by counsel in their brief, not being upon the questions of interference with collection of revenue—the primal necessity of civil government—are not in point; for all judicial announcements, to be well understood, must be considered in the light of the circumstances and the subject-matter of the litigation in which the same are promulgated, and, as is respectfully urged, a far different and more rigid rule against injunctions is adhered to in cases of taxation than other classes of litigation. Especially is this true as to the policy of law of Colorado and the announcements made by the courts of the United States.

The courts of Colorado and of the United States have, through a long line of decisions, manifested marked reluctance to interfere with the state authority in the collection and disbursement of its revenue in the necessary discharge of governmental affairs, and have been so loath by injunction in equity to usurp the duties of assessment, collection, and equalization of taxes as to adhere rigidly to the rule denying injunctions against the collection of tax in all cases except such as where, because of some marked and peculiar condition, the ordinary remedy established by law is insufficient to afford relief.

Price vs. Kramer, *supra*, was a case where the owner had cattle grazing over two counties, and each claimed the right to assess. The plaintiff there claimed he had been subjected to double assessment upon the same herd of cattle. The court, at page 554, cites People ex rel. Crawford vs. Lathrop, 3 Colo., 465, saying that the laws of the state define a complete system with rules and regulations guarding the property rights of the citizen and equalizing the revenue necessities of the state, and, upon page 555 of the report, in refusing the writ of injunction, says:

> 'Against an illegal tax complainant has a full and adequate remedy at law and we see no reason why in this case he should not be remanded to this remedy. Cooley on Tax. 528; Brewer vs. Springfield, 97 Mass. 125; Brooklyn vs. Messerole, 26 Wend. 132; Rev. Laws, sess, 1870, p. 123, sec. 106.'

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From this decision it is apparent that, where there is no special circumstance requiring equitable interposition, a claimant must pursue his remedy at law, which affords full, adequate, and speedy relief.

In woodworth vs. Ellsworth, *supra*, the rule is again anounced to the effect that illegality in a tax assessment will not, on that ground alone, warrant the issuance of an injunction to restrain sale of personal property for the tax, because the statute furnishes another remedy in such cases, complete and adequate. At page 518 of the report, on this question, the court says:

> "It is sufficient upon this question to say that even if illegal, that ground alone will not ordinarily warrant the issuance of an injunction to restrain the sale of personal property to satisfy the tax. The statute furnishes another remedy in such case which is complete an adequate. Price et al. v. Kramer, ante, p. 546."

In Hallett vs. Arapahoe County, supra, the plaintiff sought by injunction to restrain the collection of taxes upon the ground that the assessment was illegal and void, and that it was the product of fraud, prejudice, bias, and ill-will of the assessor. In brief, as says Justice Gabbert: "Counsel for plaintiff contends that the respective complaints allege facts from which it appears the assessments were fraudulent * * * and that the assessor unjustly discriminated * * * in valuing the property of plaintiff." And, at pages

315 *et seq.* of the report, from the opinion of Mr. Justice Gabbert, we quote:

"Many authorities are cited by counsel for plaintiff which hold that collection of an illegal tax will be enjoined; but illegality alone is not sufficient to invoke the interposition of a court of equity to enjoin the collection of a a tax. In addition it must appear as a general rule, that its collection will result in irreparable injury to the person against whom it is enforced, or lead to a multiplicity of suits, or that he has no adqeuate remedy at law to redress the wrong which will result from the enforcement of its collection against him.—State Railroad Tax cases, 92 U. S. 575; Boyr v. Selma, 96 Ala. 144; Dodd v. City of Hartford, 25 Conn. 232; Green v. Mumford, 5 R. I. 472; Dows v. City of Chicago, 11 Wall. 108; Messeck v. Board of Supervisors, 50 Barb. 190; Hannewinkle v. eGorgetown, 15 Wall. 547; Odin v. Woodruff, 31 Fla. 160; Loud v. City of Charlestown, 99 Mass. 208; Seyre v. Tompikns, 23 Mo. 443; Barrow v. Davis, 46 Mo. 394; McPike v. Pew, 49 Mo. 525; eHnry v. Gregory, 29 Mich. 68; Youngblood v. Sexton, 32 Mihc. 406; Ritter v. Patch, 12 Cal. 298; Conley v. Chedick, 6 Nev. 222; Susquehanna Bank v. Board of Supervisors, 25 N. Y. 312; Van Cott v. Board of Supervisors, 18 iWs. 259; City of Highlands v. Johnson, 24 Colo. Ins. Co. v. Bonner, Ib. 220; Ins. Co. v. Bonner,

7 Colo. App. 97; High on Injunctions (4th ed), sec. 491.

The reasons for this rule have been vigorously stated by the courts, to the effect that a state cannot exist unless taxes are regularly and promptly paid into its treasury; that a court of equity never assumes jurisdiction where the party invoking its aid may redress his alleged grievances in an action at law; that the levy of taxes is a legislative, and not a judicial function; and that a court can neither make, nor cause to be made, a new assessment if the one complained of be erroneous.

In State Railroad Tax Cases, it was held, (quoting from the syllabus):

'While this court does not lay down any absolute rule limiting the powers of a court of equity in restraining the collection of taxes, it declares that it is essential that every case be brought within some of the recognized rules of equity jurisdiction, and that neither illegality in the proceedings, nor error, or excess of valuation, nor the hardship or injustice of the law, provided it be constitutional, nor any grievance which can be remedied by a suit at law, either before or after the payment of the tax, will authorize an injunction against its collection.'

This rule is founded on the principle that

the levy of taxes is a legislative, and not a judicial function, and the court can neither make, nor cause to be made, a new assessment, if the one complained of be erroneoues; and also in the necessity that the taxes without which the state could not exist should be regularly and promptly paid into its treasury.

On these questions the court, at page 614, says:

'We do not propose to lay down in these cases any absolute limitation of the powers of a court of equity in restraining the collection of illegal taxes, but we may say, that in addition to illegality, hardship or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors, and excess in valuation, or hardship, or injustice of the law, or any grievance which can be remedied by a suit at law, either before or after the payment of taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax. One of the reasons why a court should not thus interfere as it would in any transaction between individuals, is, that it has no power to apportion the tax, or to make a new assessment, or to direct another to be made by the proper officers of the state. These officers and the manner in which they shall exercise their functions are wholly beyond the power of the court, when so acting. The levy

of taxes is not a judicial function. Its exercise by the constitutions of all the states, and by the theory of our English origin, is exclusively legislative. A court of equity is, therefore, hampered in the exercise of its jurisdiction by the necessity of enjoining the tax complained of in whole or in part, without any power of doing complete justice by making, or causing to be made, a new assessment on any principle it may decide to be the right one. In this matter it may, by enjoining the levy, enable the complainant to escape wholly the tax for the period of time complained of, though it be obvious he ought to pay a tax, if imposed in the proper manner.'

Applying these principles to the case at bar, it appears that the respective complaints do not state a cause of action, which entitles the plaintiff to the relief prayed. He states no issuable facts from which it is made to appear that he will suffer irreparable injury in the event the collection of the tax for the respective years assessed against him is enforced, nor does it appear from any averments of the complaint that the wrongs of which he complains may not be adequately redressed in an action at law.

Besides, our statutes appear to afford a legal remedy. By Sec. 3795, Mills' Ann. Stats., it is provided that the Board of County Commissioners shall have power at any regular

meeting to rebate, annul or set aside an assessment made by the assessor. We do not wish to be understood, however, as holding that this section is applicable. Counsel for the defendants assert that it is, and this assertion is not controverted by counsel for plaintiff. It may be that this section is superseded by Sec. 3795a, 3 Mills' (Rev.) Stats.

By Sec. 3777, 2 Mills' Ann. Stats., it is provided that taxes paid which shall thereafter be found to be erroneous or illegal, shall be refunded, without abatement or discount, to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded the plaintiff by this section is not adequate.

But counsel for plaintiff contend that the general rule as above announced is not applicable because the assessments attacked are void on account of fraud. If fraud creates an exception, and fraud is pleaded, then the respective complaints still fail to state a cause of action.

As we read the authorities cited by counsel, they only go to the extent of holding that equity will enjoin the collection of a tax based on a fraudulent assessment, without regard to the question of an adequate remedy at law; but they do not hold that such a tax will be enjoined without a showing that the party

against whom it is assessed is, or will be, injured thereby."

From the language in the Hallett case, *supra*, it is clear that in Colorado the Supreme Court holds that the provisions of 2 Mills' Annotated Statutes, section 3777 (identical with the principal part of the language contained in section 5750, Revised Statutes, 1908), afford to one who has been illegally taxed an adequate legal remedy, unless by proper pleading it is otherwise shown.

The facts and conditions in the Hallett case are practically identical with those at bar. The wrong alleged was averred by conclusions similar to the present bill.

The court held in conformity with the policy of the United States cases, and cited the State Railroad Tax cases, to the effect that, in order to confer equity jurisdiction, in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction; and that mere errors, excess in valuation, hardship or injustice of the law, or *any grievances which can be remedied by a suit at law, either before or after payment of taxes*, will not justify a court of equity in interfering by injunction to stay collection of a tax.

The court further makes clear that in Colorado the same view is entertained as by the courts of the United States, to the effect that the levy and colletcion of taxes is a legislative and not a judicial function; that a court cannot make, nor cause to be made, a new assessment;

and, clearly, that the functions of the constituted authorities in taxation, necessary to the very life of civil government, are not to be interfered with in equity, except alone where it is clearly made to appear that the legal remedy is inadequate and that equity only can grant relief.

In the Hallett case, all the objections which are here urged against the employment of the plain, adequate, legal remedy could have been advanced with equal consistency as in the case at bar. There Arapahoe County was a municipal branch of Colorado, in character practically identical with that of the defendant here. It had its cities, towns, school districts, and taxing divisions of the same character as those of Weld.

Clearly, in the contemplation of the court the alleged grievances of the plaintiff in the Hallett case were afforded sufficient remedy by application for rebate to the board of county commissioners of that county, under the provisions of the statute which then was and still is in force in Colorado, by means of an application for the refund or rebate, and, if relief was not there granted on the claim, by an appeal to the District or County Court of the County of Arapahoe. There is no indication in the expression of Mr. Justice Gabbert in that case that this would require a multiplicity of suits or any suit, except the one upon the claim clearly shown to be the remedy under the provisions of the law.

In Bent County vs. Santa Fe Railway Company, *supra*, the railway company sought by injunction to

restrain the collection of a tax, on the ground that the tax was illegal. In the face of the fact that counsel had stipulated that the sole question involved was the legality of the tax, and, if this was found to be illegal, the injunction should be made permanent, regardless of the lack of existence of other features of equitable cognizance, still the court held, consistently and rigidly to the policy of non-interference by injunction with the taxing authorities (except where equity alone can give relief), and denied equity jurisdiction, and, again quoting from its former decisions and the expressions of the Supreme Court of the United States, makes clear and manifest its firm adherance to the doctrine theretofore continuously expressed by the Colorado Court, here urged, that where the law affords relief no remedy in equity exists.

From the opinion of Mr. Justice White in the Bent County case, at pages 612 *et seq.*, we excerpt:

> "Public interest, judicial announcement, and, in this state, statutory enactment are opposed to injunctive interference in the collection of the public revenues.—State Railroad Tax Cases, 92 U. S. 575, 613, 614; Dows v. City of Chicago, 11 Wall. 108; Hennewinkle v. Georgetown, 15 Wall. 547; City of Highlands v. Johnson, 24 Colo. 371; Woodward v. Ellsworth, 4 Colo. 580; Price v. Kramer, idem 546; Ins. Co. of No. Amer. v. Bonner, 7 Colo. App. 97, Section 5750, R. S.
>
> The policy of non-interference by the

courts with the process of collecting the taxes on which the state depends for its continued existence, "is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice.' State Railrad Tax Cases, *supra.*

In Dows v. City of Chicago, *supra,* cited and quoted from in the State Railroad Tax cases, *supra,* after commenting upon the necessary reliance of the state governments upon the prompt collection of the taxes for their support and maintenance, and the ill consequences of interference with their proceedings in that matter it is said:

No court of equity will, therefore, allow its injunction to issue to restrain their collection, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary process of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or where the property is real-estate, throw a cloud upon the title of complainant, before the aid of a court of equity can be invoked.

While perhaps no absolute limitation has been placed upon the powers of courts of equity in restraining the collection of illegal taxes, it is settled beyond question that 'in addition to illegality, hardship, or irregularity, the case must be brought within some of the recognized foundations of equitable jurisdiction, and that mere errors or excess in valuation, or hardship, or injustices of the law, or any grievance which can be remedied by a suit at law, either before or after payment of the taxes, will not justify a court of equity to interpose by injunction to stay collection of a tax.'—State Railroad Tax Cases, *supra.*

So recognizing the law, and appreciating the necessity of prompt payment of the public revenue as an essential prerequisite to efficient government, the general assembly enacted a law that * * * *'in all cases where any person shall pay any tax, interest or cost, or any portion thereof, that shall therafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or an adequate remedy to the taxpayer in all discount to the taxpayer.'*—Sec. 5750, R. S., *supra.*

We do not hold that this statute affords

an adequate remedy to the taxpayer in all cases founded upon an erroneous or illegal tax. We readily conceive that a case might arise in which the complainant would not have an adequate remedy by an action at law based upon the statute. Facts like those in Cummings v. National Bank, 101 U. S. 153, would bring a case witin the exception. The case at bar, however, is not within the exceptions recognized by the authorities, and the trial court erred in taking jurisdiction of the case.

Nevertheless as the parties stipulated in the trial of the cause that the sole question involved was the legality of the tax in question, and if the tax was found to be illegal, the injunction should be made permanent, regardless of the lack of existence of other features of equitable cognizance, we shall determine the matter upon its merits, but shall not consider ourselves bound to so proceed in other causes of similar import that may hereafter be brought before us. (Italics ours.)

It is well to observe that the Supreme Court of Colorado, in its decision in the Bent County case, announced in April, 1912, on the matter of taxes in Bent County for the fiscal year of 1905, recognized that the law of 1902 (R. S. 1908, sec. 5750), affords a legal remedy for recovery of illegal or erroneous taxes, and in that particular has in no manner modified the rights

expressed in the statute theretofore, and upheld by the decisions made prior to the last enactment.

The court, in its reference to the statutory enactments protecting the taxpayer, and announcing its position against injunctive interference with collection of taxes, at page 613 of the report cites the section, and at page 614, in its declaration concerning the necessity of prompt payment of public revenue, as a prerequisite to efficient government, quotes *verbatim* that part of the statute which counsel for plaintiff here contend no longer exists and no longer protects this right of relief as to all taxes, but pertains only to those of the state.

This Bent County case was one of a kind wherein the conditions were identical with those in Weld. Bent County contained its cities, towns, and school districts, and other subdivisions, and, of course, was amendable to suit under the statute in the same way, for the same purpose, and to the same extent as Weld County is in the case at bar.

If in the Bent County case there was adequate remedy at law for the railway company by procedure under the statute, where every circumstance as to any cloud on title of the Atchison, Topeka & Santa Fe Railway, multiplicity of suits, and all facts and circumstances were identical with the facts here, is it not apparent that there is no basis for the contention of plaintiff that, because the railroad is without adequate legal remedy, the right of injunction can be sustained?

There was nothing in the circumstances of that case, so like the case here from which it could be con-

tended that full and speedy relief is not accorded by the provisions of the statute, under circumstances such as those or these. This relief, if a right to any exists, is so plain, speedy, and adequate as to bar resort to equity, except in those instances where peculiar circumstances, such as stated by Mr. Justice White under the facts in Cummings vs. National Bank, 101 U. S., 153, bring the case within the exception to the rule.

In Cummings vs. National Bank, *supra*, the facts were such as to warrant interference by a court of equity in behalf of the trustee(the bank), which in Ohio was required to pay the tax upon the shares of its stock. The Constitution of Ohio required a uniform rule in taxation of money's, credits, investments and bonds, stocks, joint-stock companies, or otherwise, and also on real and personal property according to its true value in money.

Through a practice long indulged, this constitutional demand had been evaded, and real-estate and personal property was assessed at about one-third, money at about three-fifths, and bank stock at full value. At page 156 of the report, from the language of Mr. Justice Miller, in his opinion, it appears that the statute of Ohio authorizes the bank to pay the tax on the shares of its stockholders and deduct the same from dividends or any funds of the stockholders in its hands or coming afterward into its possession, and forbids the bank to pay any dividends on such stock, or to transfer it, or to permit it to be transferred on its books, so long as the tax remains unpaid. It further appears from this page of the report that it was sug-

gested that, since there was a plain, adequate and complete remedy by paying the money under protest, and suing at law to recover it, there could be no equitable jurisdiction:

In answer to this, the court says:

> " The reply to that is that the bank it not in a condition where the remedy is adequate. In paying the money it is acting in a fiduciary capacity as the agent of the stockholders,—an agency created by the statute of the state. If it pays an unlawful tax assessed against its stockholders, they may resist the right of the bank to collect it from them. The bank as a corporation is not liable for the tax, and occupies the position of stakeholder, on whom the cost and trouble of the litigation should not fall.
>
> If it pays, it may be subjected to a separate suit by each shareholder. If it refuses, it must either withhold dividends, and subject itself to litigation by doing so, or refuse to obey the laws, and subject itself to suit by the state. It holds a trust relation which authorizes a court of equity to see that it is protected in the exercise of the duties appertaining to it. To prevent multiplicity of suits, equity may interfere."

From this language it is apparent that in the case of the bank there was reason for equity jurisdiction because of peculiar circumstances surrounding the

trustee, which would be subjected to a multiplicity of suits but for the injunction, whatever course it might pursue.

It should also be noted that at the time of the decision in this case there was a different policy of law in vogue in Ohio from what there is now in Colorado; for in Ohio, as Justice Miller asserts at page 157 of the report—

> "The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases."

From this it is apparent that, even where the statute of a state permits resort to equity, and affords legal relief as well, there is the requirement of the existence of peculiar circumstances to take the case out of the general rule remanding the plaintiff to his legal remedy where the same affords relief that is adequate and speedy.

In Tallon v. Vindicator Co., *supra*, the petitioner sought to have declared void the taxes levied for the year 1913 upon mining property in Teller County, Colorado, for the reason that the assessor had adopted the wrong method of determining the value of mining property; and that commissioners had made a 6 mill levy whereas 2.7 mills was the most they had authority to levy; for which reasons the tax was void. An injunction was prayed to restrain the treasurer from en-

forcing the collection of more than was legally due, which was tendered by the petitioner. The District Court granted the injunction. The Supreme Court of Colorado found the assessments to be too high, but the levy of 6 mills was sustained, and the injunction denied for the reason that the tax was not void and the petitioner had a legal remedy by which it could recover any excess it might be required to pay.

That portion of the decision which is of interest here is as follows:

> "So it is evident under the final decision of the court, the assessor erred in his judgment in the proper construction of the rule. But this does not make the tax void, as where no tax is authorized by law, or where the property is not subject to taxation, or a rate of levy is made prohibited by law or the assessor adopts a rule for approximating values where no rule is provided by statute. In this case there was a valid tax. A tax was authorized, and it cannot be said a tax was imposed where no tax was authorized. The rate of levy was valid, the property was in existence, and was subject to taxation. The legislature provided a rule for estimating and arriving at its value for taxation. The assessor had the constitutional power to assess it and followed the correct rule, he therefore was acting within his jurisdiction. That he erred in judgment in a proper construction of the rule is undoubtedly

true, but this was not such a lack of jurisdiction as would render the tax void. It was an error in assessment. The difference consists in an absence of authority, and a mistake in its exercise. It comes under the general head of irregularities, defects, omissions, mistakes or errors of judgment, and does not render the tax *prima facie* void. *When the tax is erroneous or illegal for the reason that the assessment is erroneous, sec. 5750 R. S. 1908, furnishes an adequate legal remedy by first paying the tax, and then bringing a suit to recover back the excess. It is said this would cause a multiplicity of suits at law which would mulct the county in unnecessary costs, sufficient to give a court of equity jurisdiction. It is a prerequisite before a court of equity will interfere to restrain the collection of taxes, as a general rule, though there may be some exceptions, that the tax must be prima facie void.* Oregon Bank v. Jordan, 16 Ore. 113, 17 Pac. 621; Balfour v. City of Portland, (C. C.) 28 Fed. 740; McLeod et al. v. Receveur, 71 Fed. 455, 18 C. C. A. 188; Mayor v. Davenport, 92 N. Y. 604; Collins v. City, 118 Ia. 30, 91 N. W. 791." (Italics ours).

In Nile District v. English, *supra*, the court was passing on the question of sustaining the order of the lower court in granting an injunction to restrain the collection of an irrigation district tax. The Supreme

Court reversed the decision of the lower judge, by Mr. Justice Bailey saying:

> "Upon a full consideration of public interest, of judicial pronouncement in general upon the subject involved, and of our statute, Sec. 5750 R. S. 1908, which affords a complete remedy in a proper case, *we are of opinion that it is rarely possible, and then under most exceptional and unusual circumstances, that a cause of action to restrain the collection of taxes can be stated of which equity will or ought to take cognizance.* (Italics ours).

From the foregoing authorities we have seen that the statute of Colorado from 1870 to the present time afforded a definite, and a full, speedy, and adequate, remedy at law for the relief of all taxpayers in all cases where they shall have paid any tax thereafter found erroneous or illegal, whether the same be owing to erroneous assessment, improper or illegal levying of the tax, or clerical or other irregularities by commanding a refund by the county commissioners without abatement or discount; and that this remedy, affording adequate relief, is exclusive, except in the case of special circumstances, where, by allegation and proof, it is made to appear that equity alone can grant relief. And, further, it is clear from the judicial declarations of this legal policy by the Supreme Court of Colorado not only that its courts stand in harmony with the policy of the courts of the United States, but that, in the long line of unbroken decisions sustaining

this position, the Colorado court repeatedly quotes with approval its expressions and declarations.

These authorities also make apparent that during all the time wherein the Colorado courts consistently adhered to the doctrine announced, the courts of the United States were declaring the same principle,—and also that in the Nile v. English case, the highest court of Colorado expressly approves the decision of the Circuit Court of Appeals in the case at bar which by the plaintiff is sought to be overturned.

The attitude of the Supreme Court of the United States in upholding and announcing this doctrine is perhaps nowhere more concisely and clearly expressed than in the recent case of—

Singer Sew. Mchine Co., vs. Benedict, 179 Fed., 628;

Singer Sew. Mchine Co., vs. Benedict, 229 U. S., 481.

Mr. Justice Van Devanter delivered the opinion of the court, and among other things, in upholding this policy of the law adhered to the Colorado decisions, and at page 484, said:

> "In the courts of the United States it is a guiding rule that a bill in equity does not lie in any case where a plain, adequate and complete remedy may be had at law. The statute so declares, Rev. Stats., sec. 723, and the decisions enforcing it are without number. If it be quite obvious that there is such a remedy, it is the duty of the court to interpose the

objection *sua sponte*, and in other cases it is treated as waived if not presented by the defendants *in limine*. Reynes v. Dumont, 130 U. S. 354, 395; Allen v. Pullman's Palace Car Co., 139 U. S. 658."

And, at pages 485 et seq. of the same report, he says:

"It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable, and efficient as the remedy in equity.

A statute of Colorado enacted in 1870 (Laws 1870, p. 123, sec. 106) and embodied in subsequent revenue acts (2 Mills' Ann. Stat. Sec. 3777; Laws 1907, C. 3, pp. 43, 146, sec. 202; Rev. Stat. 1908, sec. 5750), declares that, 'In all cases where any person shall pay any tax, interest or cost, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, to clerical or other errors, or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer.' This statute imposes upon the county commissioners the duty of refunding, without abatement or discount, taxes which have been paid and are found to be illegal, and confers upon the taxpayer a correlative right to enforce that duty by an action at law. As long ago as 1879 the supreme

court of the state, in holding that the invalidity of a tax afforded no ground for enjoining its enforcement, said of this statute: 'Against an illegal tax, complainant has a full and adequate remedy at law, and we see no reason why in this case he should not be remitted to that remedy.' Price v. Kramer, 4 Colo. 456, 555. And again: 'The statute furnishes another remedy in such cases which is complete and adequate.' Woodward v. Ellsworth, Id. 580, 581. And that this view of the statute still prevails is shown in Hallett v. Arapahoe County, 40 Colo., 308, 318, decided in 1907, where, in refusing equitable relief against the collection of taxes alleged to be illegal, the court said (p. 318): 'By sec. 3777, 2 Mills' Ann. Stat., it is provided that taxes paid which shall thereafter be found to be erroneous or illegal, shall be refunded, without abatement or discount to the taxpayer. No statement appears in either of the complaints from which it can be deduced that the remedy afforded the plaintiff by this section is not adequate.'

We refer to these cases, not as defining the jurisdiction in equity of the circuit court, for that they could not do (Payne v. Hook, 7 Wall. 425, 430; Whitehead v. Shattuck, 138 U. S. 146; Smith v. Ames, 169 U. S. 466, 516), but as showing that the Colorado statute gave to one who should pay illegal taxes a right to recover back from the county the money so paid. This right was one which could be enforced by an action at law in the circuit court, no less than in the state courts, if the elements of federal jurisdiction, such as diverse citizenship, and the requisite amount in controversy were present. Ex parte McNeil, 13 Wall. 236, 243;

United States Mining Co. v. Lawson, 134 Fed. Rep. 769, 771. Thus it will be perceived, that, if the taxes in question were illegal and void, as asserted, the company had a remedy at law. It could pay them and, if the commissioners refused to refund, have its action against the county to recover back the money. Such a remedy, as this court often has held, is plain, adequate and complete, in the sense of the guiding rule before named, unless there be special circumstances showing the contrary. Dows v. Chicago, 11 Wall. 108, 112; State Railroad Tax Cases, 92 U. S. 575, 613-614; Shelton v. Platte, 139 U. S. 591; Allen v. Pullman's Palace Car Co., Id. 658, 661; Indiana Manufacturing Co. v. Koehne, 188 U. S. 681, 686."

From this decision it is clear that the position of the Supreme Court of the United States upholds the policy so announced by the Supreme Court of Colorado, to the effect that a bill in equity does not lie in any case where there is a plain, adequate and complete remedy at law; that the statute of Colorado grants such remedy at law in all cases, as above recited; and that this statute imposes upon the county commissioners the duty of refunding to the taxpayer, without abatement or discount, taxes which have been paid and are found to be illegal, and confers upon such taxpayer the right to enforce that duty by law.

It cites, approves, and upholds Price vs. Kramer, Woodward vs. Ellsworth, and Hallett vs. Arapahoe County, above cited.

Thus it is manifest that the attitude of the Supreme Court of the United States is in strict accord

with the decisions rendered in the cases last mentioned, which clearly declare that the statute of Colorado affords an adequate and speedy relief for the recovery of taxes paid which were erroneous or illegal; and therefore it necessarily follows, in view of the long, uninterrupted line of decisions of the Supreme Court of Colorado, and of the Supreme and other courts of the United States, that where there is an adequate legal remedy for the protection of the person paying the erroneous or illegal tax, equity will not interfere with the fiscal operations of state government, but that the remedy at law is exclusive.

Justice Van Devanter asserts that, upon this question of allowing interference with the administration of the law in regard to collection of public revenues, there is some conflict of authorities among the courts of the different states, but that this is a matter of choice of policy, and that in Colorado the statute is clear, and the policy established by its courts is in conformity with the decisions of the courts of the United States. This being true, it is difficult to understand upon what premise it can successfully be contended that in the case at bar plaintiff has not an adequate and complete remedy at law.

In the Singer case it was contended that there was no adequate remedy at law, and this contention was denied on the basis of the Colorado statute and the Colorado decisions.

If the allegations of this bill are established, the portion of the tax of plaintiff for 1912 which is challenged as illegal and erroneous the plaintiff could and

should pay, in conformity with the provisions of the laws of the state, and make application for the refund; and, if this be refused, enforce the repayment by an action at law; which, as Judge Van Devanter asserts in the Singer case, affords sufficient relief.

This action at law will afford every relief accorded in an action in equity; for, as is said of the plaintiff, the defendant, too, is solvent and able to respond. Again, defendant is in the discharge of public duties and public service necessary in the carrying on of civil government. It is to preserve and to render possible the discharge of these civic duties by public officers that revenues are necessary and collected; and it is for the preservation and accomplishment of these objects that the collections are not to be stayed, except alone in those cases where, in the collection of the necessary revenues of the state, some wrong has been done to the taxpayer in violation of the Constitution and law commanding uniformity and equity of burden; which wrong cannot be remedied without the extraordinary interposition of the strong arm of injunction.

The revenue is the necessity; equality of burden the desired incident. Interference with this primal neecssity of taxation is not to be encouraged. The laws, as established by Constitution and statute, carried out by boards and tribunals, under rules and methods to accomplish the necessary end in justice and equity, are not to be made subservient to court demand. The officers in the taxing department are chosen because of aptitude and ability for the work required. Injunctive interference is the last, and not the first resort in this administration of the law.

Injunction indulged to the extreme may interfere with the discharge of the functions of the state; but by the payment of taxes by all payers, with a legal remedy, full and adequate, for the protection of any unjustly burdened, the rights of all are fully protected and the interests of the state alike conserved. This is clearly the policy of the laws of Colorado and of the United States, and we therefore earnestly urge that the decision of his Honor, Judge Lewis, in the trial of the case at bar, in view of all the allegations made in the bill, the traverses of the answer, the evidence introduced and heard in the long hearing had upon the issues joined, to the effect that the injunction prayed should be refused, is based upon sound principle, and is supported by the law and the judicial declarations of the highest tribunals of the state and of the United States.

This decision of the trial court has been affirmed and should not be disturbed.

VII.

PLAINTIFF NOT ENTITLED TO INJUNCTION ON THE EVIDENCE.

Even tho the plaintiff was entirely without legal remedy (which is not conceded), no injunction should be granted.

It is confidently maintained that the decision of the trial court in denying the application for a temporary writ should be sustained, even though equity jurisdiction exists; for, under the issues joined and from the evidence introduced under the rules applicable in such

cases, the writ should be denied because it is and was apparent from a consideration of the record that no grounds for injunctive relief did or do exist.

Discrimination is correctly said by plaintiff to be the basis of the cause. That is, adequately of tax burden between property assessed by the local taxing authority and that imposed upon the property of the plaintiff in 1912 by the Tax Commission must be shown, or the cause of plaintiff fails.

No amount of error, omission, or fraud can give rise to right to relief to plaintiff by injunction, temporary or permanent, unless it be shown that, as the result of the improprieties, an unjust and undue burden of taxation is imposed upon the plaintiff who seeks relief.

State Railroad Tax. Cases, 92 U. S., 575-613.
Hallett vs. Arapahoe County, 40 Colo., 309, 318, 319.

While uniformity of burden is the aim and purpose of the law, to the end that all values of property shall share alike, in acocrdance with their value, equally and equitably the burdens of taxation, this is an accomplishment ever sought and never attained.

Approximation of equality in discharge of tax burdens is all that is required or to be expected, and slight deviation from this attempted standard is insufficient to afford relief.

Therefore, mere omissions of property from taxation in any given year, or occasional undervaluations of property, do not give rise to a right to relief to a

payer whose property is taxed, and thereby to some extent burdened unduly for governmental support.

Before the plaintiff is entitled to relief at law or in equity, it must be established that there was in fact a discrimination between taxpayers, and that the result was the imposition upon the plaintiff of a materially higher degree of burden, in accordance with the value of the property taxed, than that imposed upon other property contributing to the same revenues of state.

Therefore, so long as the property vaules of the plaintiff and those of other taxpayers of Weld County were in 1912 assessed for and burdened with taxation at, or approximately at, the same rate or percentage of property value, regardless of the method of reaching this result, the constitutional mandate contained in section 3 of Article X of the Constitution of Colorado, declaring that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, is complied with, and there remains no ground of complaint to excuse a taxpayer from payment of the exacted levies. This is true irrespective of the percentage of values at which all property is assessed for taxation, even though the statute requires full cash value to be the basis, so long as there is no material disparity between the percentages of value of the property assessed.

A. T. & S. F. Ry. Co., vs. Sullivan, 173 Fed., 456-467.

It is confidently maintained that the decision of the trial court was correct in holding that there was no such variance between the percentage of total value

of the property in Weld County locally assessed and that of the property of the plaintiff, and that, therefore, there was no such disparity of tax burdens between that imposed upon the property of plaintiff and that imressed upon other taxpayers of Weld County, as to give rise to any right of relief.

The allegations of the bill were traversed by the answer. The burden of proof was upon the plaintiff—not, as contended, to show a possibility of right to relief, but to show the right to an injunction. The proofs of the plaintiff at the long hearing upon the application were by the defendants met and overcome.

The court, upon the issues joined, and in full consideration of all the evidence introduced, with better opportunity to judge than an appellate tribunal, in the exercise of a sound discretion, denied the application and decided, upon this issue of fact, in favor of the defendant.

Unless this discretion be abused, which it is confidently contended it was not, the decision of the trial court should be affirmed.

> Santa Cruz Ass'n vs. Grant (Cal.), 37 Pac. 1034.
>
> Young vs. Campbell, 75 N. Y., 525.

Supported by an abundance of authority from practically every state of the Union, and of the courts of the United States as well, is the text in Volume 3, Cyc., page 329, wherein, on the subject of injunctions, it is said:

> "In instances where the granting, refusing to grant, dissolving, or refusing to dis-

solve, an injunction is discretionary and not matter of right, the action of the court will not, in the absence of manifest abuse, be reviewed on appeal."

The rule requiring proof of allegations made to establish a right to a temporary injunction interfering with the functions of public officers in the matter of assessment, collection, and equalization in taxation, it is confidently urged, ought to be, and in fact is, more strict than in carrying cases where the duties and necessities of carrying on civil government are not jeopardized or concerned.

Issues on Which the Application for Injunction Was Tried and Determined.

The contentions of the plaintiff and the defendants as shown by the pleadings in support of which both parties offered a great volume of testimony were in short as follows:

THE PLAINTIFF AVERRED:

The property of Weld County in 1912 locally assessed was valued at not more than 20% of its market value.

The property of plaintiff in Weld County in 1912 was assessed at 33% of its market value.

THE DEFENDANTS AVERRED:

The property of Weld County in 1912 locally assessed was valued at not less than 33 1-3 per cent of its market value.

The property of plaintiff in Weld County in 1912

was valued at not more than 20 per cent of its market value.

In order to assist this court in opportunity to understand to a better degree the situation and basis upon which this decision in behalf of the defendants was made, approaching that had by the trial court, with its advantage of contact with witnesses and testimony, it is necessary to carefully describe the peculiar conditions pertinent to Weld County and its taxing values; and likewise to consider, separate and apart therefrom, the undervaluations indulged and deviations from statutory command in the assessment of the railroad property, in order to make manifest the correctness of the decision sought here to be overturned.

We will treat of the evidence concerning the assessment of Weld County and that concerning the railroad property under separate headings, to-wit: WELD COUNTY and UNION PACIFIC SYSTEM.

VIII.

WELD COUNTY.

Weld County consists of 110 townships in the northern part of Colorado, traversed in part by the South Platte, St. Vrain, Big Thompson, and Cache la Poudre Rivers, as well as the tributaries of these streams, which are in the main dry, except in times of heavy precipitation on the watersheds adjacent, and except as to seepage and return waters flowing in some thereof within the territory irrigated resulting

from the application to adjoining lands of water for irrigation.

This whole area is naturally arid, fit only for the grazing of live stock by the employment of large areas for the sustenance of small herds, except where water is artificially applied by means of ditches, reservoirs, and irrigation works, by which it is carried by gravity canals to a limited portion of the land for the irrigation of agricultural crops.

This irrigable territory, when well served with water, is very productive. The character and location of the irrigable area, and the scarcity of the water supply, are such that the irrigation is accomplished at great expense in both construction and maintenance, limiting the quantity of lands well served to a small portion of the whole, and limiting the whole territory possible of service to any degree to an extent small in comparison with the area of the whole county.

Of the total area of the county, in the neighborhood of 300,000 acres lie within the embrace and under the lines of constructed and operated irrigation systems.

Within this area, about 250,000 to 265,000 acres are served by means of many systems of ditches and reservoirs, taking water from the public streams for storage and direct application to the reclaimed lands. The water rights of the various ditches depend for their available supply and that which they afford to the lands below them upon their respective priorities of right upon the streams upon which they are burdened.

The whole area being arid, and successful irrigation being dependent upon the amplitude of flow, the

same character of soil as to fertilify under one ditch may, and in many instances is, of much higher value, because of its water rights and supply, than lands under another system with junior priorities. This value of land is again dependent upon the character, location, size, and priority of right of reservoirs necessary for the storage of the stream flows in the time of plenty, to be employed in the time of need. These values are again dependent upon the character of the soil. In many instances where the fertility is sufficient the water may be short. Again, the need in quantum of supply upon one area is vastly in excess of that upon another, because of porosity of soil, substratum and many other conditions; in some instances accelerating, and in others minimizing, the loss through seepage and escapement. Also the values, with equal supply in this irrigated territory, tho the lands be of equal fertility, are affected by the surface conditions, according ease or difficulty of service, high or low maintenance cost of the serving system. Then, too, lands of similar character are adversely affected in productivity and value by adverse conditions emanating from percolating or seeping waters from ditches, reservoirs, and irrigation works on higher elevations, which ofttimes injure, and in many instances destroy, (at times beyond the possibility of recall), large extents of irrigated territory.

The whole extent within the embrace of the constructed and operated ditches, because of the elevation and topography of some thereof, is not servable by gravity ditches leading from the mains; so, therefore,

there are many areas of all manner of shapes, size, and character between the ditches and reservoirs, from which their supplies are taken, unfit for service, and therefore unused for irrigated farming.

The whole system and method is artificial in its character and opposed to the natural conditions of aridity of climate, wherein there is nothing permanent, but change of condition and circumstance to an extent which cannot be comprehended and understood by persons not directly in touch with the prevalent characteristics under each system, no two of which are alike.

The water rights and priorities pertinent to these ditches and works, upon which the values of the lands served by them respectively are dependent, are held in trust by the corporate owners of the several ditches, reservoirs, and works, for the use and benefit of the farmers and lands. These corporations are composed in each instance of the farmers whose lands are served by water from the works. These corporations are termed "Mutual Companies," each farmer holding a fractional portion of the capital stock of the corporation, evidencing a water right equivalent to such a part of the whole system of works. These water rights are not held by persons not farming, except in very few instances where mortgages have been foreclosed and execution sales have divested them of ownership.

All of the water evidenced by all of these rights is annually needed and annually employed for the necessary irrigation of the land, so that each year all of the water available in summer and in winter and freshet as well, by means of ditches and reservoirs supplemen-

tal thereto, is diverted, taken, and necessarily used upon the lands to such an extent that at the close of each irrigation season the stream is low, the ditches dry, and the reservoirs empty, ready for refilling to answer in the following season the lack of rainfall pertinent to the climate.

The husbandman in this territory is required, in addition to the ordinary expense attendant upon agricultural venture, to prepare and farm his land in such a manner that the same may be served with irrigation water, and must annually, at great expense, sustain his pro rata portion of the cost of maintenance and operation of ditches, reservoirs, and extensive works, continually deteriorating in value, requiring reconstruction and improvement.

This territory, approximating in the aggregate 300,000 acres, embraces, upon many and practically all farms, areas of varying size which cannot be classed as irrigated land, because of oversaturation from seepage, impossibility of service, conditions of topography, and non-adaptability to irrigation because of elevation.

Some of this land is of value for pasture, some is of value for native hay, and some of no value whatever.

This territory, while served by some large systems of works, is under what might properly be termed, in comparison to some late attempted projects, ditches of easy construction, and has reached its present stage of development by a gradual upbuilding, extending over a period of from twenty-five to forty years.

This development is and has been of necessity

slow. The work of development of an arid territory into a farming community of productivity, requiring, as it does, the breaking of the land, the construction of laterals, the leveling of the surface, and the many changes to transform desert into productive soil, is the work, not of years, but of decades.

In addition to the territory above described, and adjacent thereto, there are, and were in 1912, upward of 250,000 acres of non-reclaimed and unimproved prairie land, within the Greeley-Poudre, the Henrylyn, the Denver Greeley Valley, the Denver St. Vrain, and the Platte Valley Municipal Irrigation Districts, which, tho it has been proposed, is not yet irrigated or reclaimed from its desert state.

The works projected for these districts, because the easy constructions had passed, required very extensive and expensive systems of ditches and reservoirs, acquired by means of irrigation district bonds in large amount upon the lands burdened, much in excess of their ability to sustain, so as to allow the lands to be farmed at a profit even if these districts had a water supply.

None of the water systems of these districts are complete, and in the main the lands are only cactus-covered prairie under line of ditches surveyed and partly constructed. Upon the lands there are in the main little or no improvements, and upon thousands and thousands of acres nothing but the bonds. To assess and tax these lands as irrigated lands would be the merest folly. As was said by his Honor, Judge Lewis, at the trial:

"They are prairie lands and will be such until developed; to tax them now as irrigated lands would be the same as to tax a calf before it is born."

The projections of these districts, now dormant, and in the case of the Greeley-Poudre District practically dead, at their beginning of construction, in the main, about 1908, for a time produced a considerable speculation in the lands, during the continuance of which many uninformed paid prices vastly in excess of the worth of the property, and some informed made purchases thereof in the hope and expectation of early disposition of the same to the unwary at these excessive prices. This speculation produced in these lands arose at about the time of construction commencement, continued through 1908 and 1909, and in the year 1910 waned, and by 1911 had practically ceased altogether, except as to trades of property for property with recited considerations of fictitious and excessive amounts for the purpose of keeping up land prices and sales.

These lands under these broken projected and undeveloped systems are beyond the irrigated territory, and, save for the surveyed lines and partly constructed works, are a part of the range, used for and, until developed, fitted only for grazing of herds of live stock and dry-farming, which is not a success. These range lands have a rental value, as shown by the evidence in the case, where entrymen have proved up and moved away, of $10 to $12 per quarter-section, and when rented by the State of Colorado, from 5 to 7 cents per acre pen annum; and for all purposes of income, ascertain-

ed by capitalization at the percentage figured by the plaintiff here in its brief, have a value of not to exceed $1 per acre.

The remaining territory of Weld County, lying beyond and above the projected and partly constructed broken works of these irrigation districts, is fit and used only for grazing of herds of live stock, and, being arid, requires a large territory for the support of a small number of animals, and since about 1906 has been to such an extent settled, fenced, and partially broken by the homesteaders, who, upon making final proof, in the main, abandon the lands and move away, that its value and capability for the sustenance of live stock have been greatly depreciated, so that the number of horses, cattle, and sheep raised upon the lands has been for an umber of years last past continually reduced.

The water rights pertinent to ditches and reservoirs employed in the irrigated territory are divided into shares of stock of their corporate owners and held by the farmers using the same, and are, from their very nature and use, so connected with the land as to be pertinent to it. They raise the value of the arid land from grazing to irrigated values, and, under the Constitution of Colorado, are not to be separately taxed. They are taxed with the land; that is, the value of the land is taxed. This value of the land is dependent upon its water supply; that is, its water right. The water rights are improvements, and are and heretofore have been taxed as such together with the land.

IX.

LAND VALUES IN WELD COUNTY.

The plaintiff contended that 60 per cent of the value of Weld County was in land, and that this property assessed at from 15 to 18 or 20 per cent of its actual value.

To establish this, the plainaiff in the main introduced three classes of evidence:

(a) The affidavits of three real-estate men—Harry T. Proctor, A. R. Gaylor, and Frank A. Hensley; a right-of-way agent for the railroad company, Frank A. Ayers; affidavits of Tax Commissioners Holcomb and Scribner; with a list of selected transfers taken from the public records of Weld County for the years 1909, 1910, 1911 and 1912.

(b) The testimony of two promoters, Daniel A. Camfield and Theodore C. Henry.

(c) Affidavit and testimony of J. U. Harris, Land appraiser of the State Land Board, and the affidavit and testimony of H. C. Fairall, former secretary of the State Tax Commission.

The affidavit of Harry T. Proctor (Rec., p. 49), a real-estate agent of Grover, asserts the value of non-irrigated land in Townships 9, 10, 11, and 12 north, of Ranges 61, 62, and 63 west (all prairie, arid range), to be from $8 to $15 per acre, and that of land in the same locality irrigable from pumping plants from $20 to $30 per acre.

There is appended to this affidavit a list of lands

this dealer had for sale at very high prices, which he had not been able to sell, but which he asserts in his affidavit were worth the listed price. This affiant also asserts knowledge of five transfers of arid range lands in the vicinity of Grover in 1912, and one in 1911, at prices ranging from $10 to $20 per acre. No opportunity was given to cross-examine this witness or to ascertain the basis of his estimations of value, or as to the nature of his knowledge as to consideration paid for the six tracts alleged to have been sold, or whether the same were sold for cash, or on time payments if cash, or traded for other land or property, or that the considerations were in fact fictitious. The character of this land is very similar; as, for example, the northwest quarter of section 31, Township 10 north, Range 60 west, which Proctor asserts sold on December 16, 1912, for a consideration of $3,200, or $20 per acre, and which was assessed, in the year 1912, at $160, or a total value of $480, was palpably overassessed, for, as appears in the testimony (Rec., p. 183) this is in the neighborhood where the government offers similar tracts for sale at $2 to $2.50 per acre.

The records show ample testimony proving to a demonstration that the lands in the list attached to this affidavit had no such value as that recited; the rental prices of which according to the testimony of Scott Davis, a witness for plaintiff was $10 per quarter-section (Rec., p. 284) and Charles H. Wait, a witness for defendants (Rec., p. 329), who used such land simply for caring for the improvements.

The affidavits of G. R. Gaylor (Rec., p. 49) a real-

estate agent at Pierce, made August 6, 1913, states he had knowledge in regard to certain sales of land, listed in the affidavit, made during the three years preceding; he had knowledge of values of certain lands he had for sale in the spring of 1912, listed; and asserts that the assessed valuation in that year of these pieces selected was but about 16.81 per cent of the value on the average.

No opportunity was given for cross-examination or ascertainment of the means of knowledge, character of considerations paid, facts as to trades and exchanges, nor any of these necessary examinations, required to reduce conclusions of an affiant to a statement of a fact. Pierce is in the neighborhood of the Greeley-Poudre Irrigation District. The three years mentioned by this affiant include the boom time in the Greeley-Poudre District, which ended in about 1910, when the bubble burst and all work ceased; since which time to the present there have been no sales for cash and practically no exchanges, and no work has been done upon the system of irrigation works, which is incomplete, bankrupt, and broken, hopelessly embarrassed by hundreds of thousands of dollars of liens of construction workers; buried under all kinds of bonds; *sans* water, *sans* works, *sans* everything but bonds and liens; the construction company inactive and unable, invested only with a hope, tho bankrupt; and the whole project an absolute failure. (Testimony of Camfield, Rec., p. 247, and Eastlack, Rec., pp. (382-386).

The affidavit of Frank A. Ayres, (Rec., p. 45), a resident of Omaha, and for years right-of-way agent

of plaintiff, asserts that during the years 1909 and 1910 (the high tide of real-estate prices in Weld County) he purchased right-of-way for plaintiff through farms and tracts of Weld, and was on some of the land, and knows the valuation of several of the tracts; and then proceeds to give a description of tracts in the vicinity of the right-of-way of the Union Pacific, and the value thereof, with their improvements at the time the assesment was made in 1912; also the assessed valuation.

There is no showing where this witness was after 1909 and1910; no opportunity to cross-examine; but simply a list of lands, and value and assessment, from which this witness has figured the percentage of assessed valuation of lands in 1912 in the list handed to him down to 13.25 per cent.

It should be remembered that land purchased for right-of-way is of necessity purchased at a higher price than the value of the land actually taken, because of the attendant damages in cutting the farm into parcels. This is especially true in an irrigated country, where the right-of-way taken renders necessary the many lateral crossings, flumes, and siphons, and the attendant expense and difficulty of service of the isolated tracts.

There being no opportunity to cross-examine, and the affidavit being prepared by counsel for plaintiff, it is somewhat surprising that a right-of-way agent, having knowledge of conditions in 1909 and 1910 only, should have placed a percentage on the assessed valuation in his estimation so high as 13.25 per cent of the

actual value. Had he, or the draftsman of the affidavit, estimated the values a little higher, he could easily have made the valuation appear of 5 or 6 per cent without injury to his employer.

The affidavit of Frank A. Hensley (Rec. p. 63), was made September 5, 1911, and gives the average of patented irrigated land in the vicinity of Hudson at $8 to $15 per acre, at that time. Just what these lands were, or where located, is not stated.

He gives the value of lands in the Henrylyn Irrigation District at $25 to$50 per acre in 1909 and 1910. This matter was all explained by witness Ireland (Rec., pp. 372-380) and witness Wait (Rec., p. 329). While the prices of these lands were in the advance during the boom in 1909, 1910, and part of 1911, and the Henrylyn Irrigation District while the construction work on its irrigation system was going and before the bonded burden was apparent, the conditions and prices were other and different in 1912. This system has not been completed, altho the lands are burdened with bonds (Rec., p. 373).

Besides the description and value stated by Hensley in September, 1911, there appear on page 73 of the printed record the assessed valuations of said tracts in 1912. It is a little difficult to understand how Mr. Hensley could insert these values in his affidavit, to which he swore in the year before these assessed valuations were made.

The affidavit of J. U. Harris, appraiser for the State Land Board (Rec., p. 65), states:

1. A list of state lands in Weld County, with appraised values fixed by himself.

2. A list of state lands appraised by others.

3. A list of sales of state lands made in 1909, 1910, 1911, and 1912.

This witness also appeared and testified.

It should be borne in mind that the state lands are sold upon long-time contracts, during which the purchaser pays no tax, except on improvements and his equity in the land; that very many contracts of purchase are made and not carried out; that the same lands have for a great many years rented, and at the present time do rent, at from 5 to 7 cents per acre, as shown by the witnesses Charles L. Wait and C. M. Ireland (Rec., pp. 329, 372).

From the list of sales in Weld County in the years mentioned in the Harris affidavit it is to be noted that sales were very numerous in 1909, falling off in 1910; only three sales in 1911, and in 1912 no sales at all. Mr. Harris testified his list contained all the sales made in those years (Rec., p. 65), and upon cross-examination stated that in 1910 and 1911, and possibly in 1909, there were a great many dry lands sold in Weld County, and there was in those years a sort of boom of high prices that fell out some time in 1911, and that thereafter there were practically no sales at all (Rec., p. 391). Conditions as to sales were very depressing in 1912, and no market (Rec., p. 391). This witness testified (Rec., p. 391) that section 36, Township 6 north, Range 63, located about six miles

east and beyond Crow Creek—a dry proposition mentioned in his list—was rightly appraised at $30 per acre; and his testimony shows that he appraised other sections of like character at like valuation. This land is beyond any hope or possibility of irrigation, and beyond reach of any ditch constructed or contemplated or possible with supply. The fact is established by the evidence of several witnesses, showing the boundaries of the irrigated territory as well as the proposed constructions. This land as so appraised, like many other tracts in regard to which this witness testified, was so wide of the actual value as to bring forth comment from his Honor, Judge Lewis. The whole list of valuations given by this witness was like the above instance—flagrantly wide of the mark of truth.

A sale of some of this land was made in 1910 to the witness Charles H. Wait—being northeast puarter of section 36, Township 3 north, Range 63—at $22 per acre. This witness explained (Rec., p. 329) that he purchased this during the Henrylyn boom to prevent some stranger obtaining lands in the middle of his pasture; he made one payment, and, the boom having subsided, made no more; and, being in no more danger, he forthwith proceeded to forfeit his first payment and rented the same land from the state at 5 cents per acre per annum, amounting to interest at 5 per cent on $1. He also testified the value of the land so appraised to be not in excess of $3 per acre (Rec., p. 329).

The testimony of witness Fairall (Rec., p. 271) shows that he made examination of the record of sales

in Weld County a few hours only, and selected a short list of transfers, wherein the recited consideration was much larger than the assessed valuations he examined the same day, and that he made inquiries thereafter the same day, and learned that some of these recited considerations were thought by the persons with whom he spoke to be correct.

The list made by Fairall was short and specially selected. The so-called verifications consisted in a few conversations with a real-estate man who, Fairall claimed, knew something about the matters from general hearsay.

Tho little opportunity, in the haste of trial, was afforded to explain the inaccuracies of this inaccurate method of this so-called verification of transfer, it was shown by witness Bliss (Rec., p. 359) that the transfer as to property conveyed by the Farm Investment Company to Brownfield, with recited consideration of $7,000, was in fact sold for $6,400, and the recited assessment given by Fairall at $450 was in fact $2,080, shown by the certified copy of the tax receipt issued upon payment of taxes thereon, for the year 1912, exhibited by Bliss in court.

It was further shown by witness Bliss (Rec., p. 359) that the so-called Fairall verification of the transfer from E. Ryder to Charles W. Beer, of certain residence property in Greeley at a recited consideration of $1,783, and as claimed by Fairall to have been assessed in 1913 as full value at $1,000, and that he had failed to look up the assessed value for the year 1912, was in fact assessed in the year 1912 for $1,000, being in

excess of 50 per cent of the amount at which said property actually sold in 1913.

As to practically all of the remainder of Fairall's verifications it was shown that they were erroneous, most of them consisting of transfers from the S. L. W. Co. to various persons. The witness Bliss (Rec., p. 359) testified that after the testimony had been given by witness Fairall he made examination of the records and interviewed parties having something to do with the transfers of the S. L. W. Co., and learned that all of said deeds were so made in 1913, but they were the outgrowth of certain contracts of purchase entered into in the years 1907 and 1908, and that said contracts and sales were made long before the deeds listed and upon a very small cash payment, and in some instances upon no cash payment at all, but upon the agreement that certain improvements would be made upon the land; and that practically one-half of the original purchasers had failed to meet the payments under their contracts, and had forfeited the same, while others, after making several payments, had turned the lands over to new parties who were willing to take up the payments at the points where the predecessors had failed and left off; and, having thus partially completed the payments in the year 1913, the S. L. W. Co., adopting a new plan, made deeds to said property to the persons then holding contracts, and recited the considerations named in the original contracts made in 1907 and 1908 as the consideration price, and took back mortgages for the payments still due. Thus it will be

seen that practically every transfer verified by Fairall was inaccurate and untrue.

The affidavit of Arthur H. Scribner, of Omaha, traveling tax agent and special agent for the tax department of plaintiff (Rec., p. 50), contained a long list of selected transfers from Weld County records between September 1, 1910, and June 6, 1913, with the considerations recited in each selected deed, and opposite thereto a statement of the assessed valuation of the tract in 1912; and concludes with a statement of this agent of plaintiff that the aggregate of the recited considerations of these particular instruments was $3,443,889, and the total assessed valuation of the same in 1912 was $512,519, and that therefore the percentage of assessed valuation of this property was 14.88 per cent.

Affiant states he selected these transfers, exercising his judgment as to what transfers and recited considerations should be included and what excluded from the list of elect, and which were, in his judgment, expressive of the true consideration paid.

The witness doing this choice work of selection of transfers, to produce the desired result, states in the affidavit (Rec., p. 59) that he excluded sales or transactions in which the consideration was apparently fictitiously stated, such as involved trades or transactions other than bona-fide sales, or that recited considerations of a nominal sum, love and affection, and all other sales of record which showed to affiant that the record recited fictitious and false considerations, all

left to the good, honest judgment of the expert doing the work. What an opportunity was here!

What a chance to do a service and save effort for the court at the trial! Here the artist, by a system of inclusion and exclusion, with the fine Italian hand in mastery of the retouching art, may produce the picture of any per cent of assessed valuation the plaintiff counsel may desire to cast upon the canvas.

But, after all, the result is dependent upon the judgment of plaintiff's agent in the first instance, and the correctness of the hearsay statements in the deeds in another, upon neither of which could we lay special emphasis. The witness was a resident of Omaha and was not possessed of any kuowledge as to persons or prices mentioned in the transfers. The affiant further recites (Rec., p. 51) that he fails to find that the assessor of Weld County had included in his tax-roll for 1912 any water rights. This was refuted by ample testimony showing that in all land sales under ditches, or practically so, the water rights go with the land, are part of the property sold, are improvements of the land, not separately taxed, but are taxed with the land, in acordance with the Constitution and laws of the state.

This affiant further says that he has inspected Exhibit A of the affidavit of George G. Holcomb, which is a similar list, selected by another agent in similar manner and for the same purpose, except that it contained transfers selected from Janaury 1, 1909, to August 23, 1910; and that the affiant, from the assessed valuations attached to the list of his co-laborer, shows

that the recited considerations in this selection aggregate $4,400,867, and the assessed valuations $615,357, and that the lands, therefore, were assessed in 1912 at 16.26 per cent. of their value; and that, taking the list selected and prepared for this purpose by himself, and the list selected and prepared for like purpose by his co-laborer, it is shown that the assessed valuations of these lands were 15.26 er cent. in the two selections.

The 14.88 per cent. of Scribner and the 16.26 per cent. of Holcomb, averaged, bring forth a per cent. of 15.62. This remarkable fact to demonstrate, either that, under the law of averages, the final figure is beyond dispute, or, better still, to show how, like tenors singing together in harmony these companion experts can, with two selections of chosen transfers, with perfect ease and no discord, make truth-telling figures perform at their will.

The affidavit of George G. Holcomb (Rec., p. 76), a resident of Omaha, Nebraska, special agent and assistant tax commissioner of plaintiff, describes his selections as a list from the public records from Weld County, made in the manner and for the purpose as described by affiant Arthur H. Scribner; which list, attached to the affidavit as Exhibit A, covered selected transfers from January 1, 1909, to August 23, 1910, with the assessed valuation of 1910 and 1912 opposite to each selected transfer. This list is closed with a recital that the percentage of values of the pieces taxed in 1912 was 16.26 per cent. There is also appended to this affidavit a list marked Exhibit B, being some of the transfers contained in Exhibit A of the affidavit

in regard to which Mr. Holcomb claims he ascertained that each recited consideration was in actuality paid as recited in the deed. This list is followed by a recital to the effect that the lands noted were in 1912 assessed at 19.76 per cent. of their value. It is clear that, from this method of selection of transfers, dependent, as it is, upon the record, wherein the recitals are but hearsay, and almost invariably overstating the value of the property conveyed, for the purpose of swelling the ruling price in case the grantees desire to dispose of their property, the selector of transfers being in the employ of a party in interest, whose judgment is to be exercised alone as to what considerations are expressive of the actual amounts paid, and the selections being made from transfers occurring during boom time for land sales, as shown by the evidence, when every tendency is to overstate values and considerations in sales—it is apparent that, by a method of exclusion and inclusion, to suit the desires, judgment, and opinions of the party preparing the list, any result desired to be obtained may be produced for exhibition.

The difficulty of refutation of this class of evidence, if evidence it be, is apparent; for the grantors and grantees of the lands mentioned are so numoreus and wide apart that it is almost impossible to meet such testimony except by the selection of another list, which would be subject to the same criticism and fallacy.

To meet this testimony, the defendant had prepared, at great expense, an abstract of all transfers of

record made by warranty deed and placed of record in Weld County during the year 1912; and from the evidence of witness Bliss (Rec., p. 360) it appears that the selections made by the two tax agent affiants were limited to the class best adapted to produce a result favorable to the plaintiff and against the defendant, and that the list excluded very many deeds which, in the judgment of that witness, more nearly related to the value of the property conveyed, and more properly represented the true considerations paid, than the deeds selected by the employes of the plaintiff, for the designed purpose of showing the disparity between the recited consideration and the assessments made.

It was especially noticeable that in this selected list, apparently designed to sustain the contentions of the employer, there was an absolute omission of all deeds made by order of the probate court, wherein the true consideration would be most likely recited. It was also explained in the evidence that many of these recited considerations were upon lands which were shown to be absolutely unimproved prairie range, of a value not in excess of $2 to $3 per acre at the outside, tho the considerations recited range remarkably near $10 per acre; and also noticeable in the omission from the list of transfers where the recited consideration was less than $10 per acre; with practically an absence of the recitals of deeds of range and prairie land where the grantees and grantors were residents of the communities.

Affiant Holcomb, to explain the fairness of his selections and the accuracy of these recited considera-

tions, claims to have learned from hearsay, which he called verification, that many of the recited considerations, and particularly those listed in Exhibit B of his affidavit, were in accordance with the considerations paid.

These so-called verifications were the merest sham. This witness in his testimony had certain cards to which he referred, where he had asked real-estate dealers and others whether the consideration was correctly recited, and as to a number he stated his cards showed, for example: "Weasel say O. K."

The witness Bliss made inquiry into a number of these transactions during the course of the trial, and also had, because of his connection with certain of the negotiations, when the transfers were made, personal knowledge as to some thereof. The flagrant inaccuracy of this method of obtaining evidence as to the value is made manifest by a consideration of the facts concerning the transfers of some of the properties mentioned, and comparing those with the recitals of consideration contained in the selected deed.

Mr. Bliss testified in regard to a number of the transactions, some of which we here recite, to exemplify the wide variance between the worth of the lands sold and the considerations recited, and the lack of dependence to be placed upon the so-called verification method explained by the tax officers, even to show the estimate of the parties of value of the property conveyed.

Bliss testified (Rec., p. 360 *et seq.*) that he had

certain knowledge concerning the transfer of the W½ SW¼ SE¼, of sec. 2; NE¼ and S½ of sec. 3; all in Tp. 4 N., R. 63; described in Mr. Scribner's affidavit as having sold for $60,000 in 1910, and assessed at $3,330; that a party holding mortgage upon this land as a part of the purchase price consulted him in regard to foreclosure mortgage in the sum of $28,000 on this entire tract, and stated that he did not want to foreclose unless he could obtain personal service upon the mortgagor, so that he might obtain a deficiency judgment, as he was not willing to purchase the land at sheriff's sale for $28,000, as in his opinion, altho he had formerly owned and operated the ranch, it was not worth anywhere near said $28,000.

And it was further testified (Rec., p. 360) that the NE¼ of sec. 5, Tp. 6 N., R. 67, which was recited in Scribner's affidavit as having sold for $25,000, was, some time in the winter of 1912 and 1913, sold under execution for approximately $6,600, and, as shown by Mr. Scribner, was assessed for $2,120.

It was further shown by Mr. Bliss (Rec., p. 360) that he foreclosed a mortgage upon the SE¼ of sec. 3, Tp. 1 N., R. 68, and that upon the sale thereof, some time in the fall of 1912, the mortgagee purchased the land at sheriff's sale for $1,700; and stated to Mr. Bliss that it was, in his opinion, more than he should pay for it, altho it was recited in Scribner's affidavit to have been sold in 1911 for $8,000.

This witness (Rec., p. 361) drafted a certain deed for Mr. Condon, conveying the S½ of sec. 17, Tp. 7

N., R. 64, to Mr. Thompson, with the recited consideration of $7,000; that said transfer was made in the division of said land, and that at that time the land had a value of not in excess of $1,600 ,altho, as recited in Mr. Scribner's affidavit, the transfer consideration was $7,000.

The transfer of the NE¼ of sec. 28, Tp. 6 N., R. 64, (Rec., p. 361) with recited consideration of $25,000, said to have been assessed at $4,060, was only part cash and part trade; and it was further shown that the transfer of the NE¼ of sec. 29, Tp. 7 N., R. 64, which was recited in Holcomb's affidavit, and claimed to have been verified by Weasel, as having sold for $6,400, had paid upon the purchase price $1,500, and that the purchaser was unable to pay anything more and deeded the same back to the mortgagee without consideration.

The wide disparity betwen the values of land and the recited considerations in the selected list of the tax agent witnesses of plaintiff in part appears from the testimony of Ireland (Rec., p. 372), to-wit:

SE 32-2-64 (Ireland, Rec., p. 374, affidavit, p. 55), with recited consideration in the affidavit list of $10,000 and assessment in 1912 of $3,520, is sand-hills, open range land, and unimproved, worth not to exceed $2 per acre. W½ 26-2-64, recited in the affidavit list as having sold with above, and same assessment, is sand-hills, open range, without improvements, worth not to exceed $2 per acre. Sec. 25-2-65, recited consideration and assessment same, is sand-hills, open range prairie, unimproved, worth not to exceed $2 per acre. Sec. 32-2-65, same, consideration $10,000, assessment

$3,520, is sand-hills, open range prairie land, unimproved, and worth not to exceed $2 per acre; and if the same was transferred at that consideration at the time stated in the affidavit, it was transferred from one company to another, and no money changed hands, as the Kearnes Investment Co. is composed of Stybr and Kearnes, and the same parties are also the owners of the other company to that transfer (Rec., p. 374). NE 10-1-62 (affidavit, Rec., p. 53) is above any hope of irrigation and not in any district, is without enough vegetation to furnish feed for five head of cattle, and has a value of not to exceed $1 to $2 per acre, altho listed in theaffidavit as having sold for $2,800 and assessed at $420 (Rec., p. 374). NW 14-2-65, recited consideration in affidavit list (Rec., p. 53) $7,625, assessed $480, is sand-hills, pasture land, worth not in excess of $2 per acre. Sec. 7-2-65, recited consideration in affidavit list (Rec., p. 60) $47,361, assessed in 1912, $1,920, is rough, sandy land. Some parties moved out there this spring, plowed it up, and put in a crop; tried to irrigate and cultivate the same, and could not get enough crop to harvest. I asked them why they did not get on some hard ground, and they said that did not cost them anything to speak of, as they traded an equity in a hardware business for it. Lots to do there before that land is fit for irrigation, and then only part of it! NE 5-1-63 is prairie land, worth $2 to $3 per acre, with recited consideration in affidavit list (Rec., p. 55) $1,920, and assessed at $160. NE 2-1-65, recited consideration in affidavit list (Rec., p. 55) $4,000, assessed at $420, located near

Hudson, is sandy and unfit for irrigation, but because of proximity to Hudson is worth $3 per acre for pasture purposes. SW 23-2-63, recited consideration in affidavit list (Rec., p. 56) $2,000, assessed at $370, is prairie land, worth not in excess of $2 to $3 per acre. N½ SE 34-3-65, recited consideration in affidavit list as having sold in 1910 for $4,000, and assessed at $240, is not in any district, is sandy grazing land, used for that purpose and unfit for any other, and worth not to exceed $2 to $3 per acre. S½ SE 15-1-63, recited in the affidavit list (Rec., p. 64) as having sold in 1910 for $4,000, and assessed at $240, is grazing land, worth not to exceed $2 or $3 per acre. E½ NW 26-1-63, recited in affidavit list (Rec., p. 56) as having sold in 1910 for $3,600, and assessed for $240, is prairie grazing land, worth not to exceed $2 to $3 per acre. S½ S½ 25-2-64 is open prairie land, worth not to exceed $2 to $3 per acre, but listed in the affidavit (Rec., p. 60) as having sold at $2,400, and assessed at $320. E½ 31-1-62, recited in the affidavit (Rec., p. 57) as having sold in 1910 for $4,640, and assessed at $640, is open prairie land, twelve miles from railroad, unimproved, has nothing on it but cactus and prairie-dogs, is unbroken in every way, and did not return a penny (Rec., p. 375) NW¼ 14-2-65, recited consideration in affidavit (Rec., p. 53) $7,625, assessed at $480, is unfit for irrigation and used for pasture only.

Witness Charles H. Wait, who lived in the sandhill range country near Roggen for over twenty years immediately prior to this proceeding, engaged in stock-raising, testified that the land in that vicinity was

worth not in excess of $2 to $3 per acre; that sec. 36-3-63, recited in the affidavit of J. U. Harris as sold for $22 to $26 per acre, is the section in which he bid in a quarter at state land sale, and the actual value of which is and was not in excess of $3 per acre; that he purchased said land for the purpose of keeping strangers from obtaining land in his pasture (Rec., p. 329). Sec. 12-3-63, recited in Harris' affidavit as having sold for $10 per acre in 1910, has a value of not to exceed $3 per acre, and that the purchaser at said sale made one payment and abandoned the land (Rec., p. 329). W½ SE¼ 23-4-61, recited in affidavit as sold March 20, 1913, for $2,500, and assessed at $420, is sandy grazing land, worth not to exceed $3 (Rec., p. 329). NE¼ 10-3-63, recited consideration in affidavit $1,500, assessed at $320, is sand-hills; no ditch contemplated to it; worth not to exceed $2 per acre (Rec., p. 329).

That he is well acquainted with land above the ditches south of the South Platte River in Weld County, and it is worth not to exceed $2 to $3 per acre (Rec., p. 329).

The testimony of A. R. Fischer (Rec., pp. 295 *et seq.*) reads as follows:

> "In some comparisons I made I found that the consideration recited in the deeds in the Chalk Bluffs country, mentioned in Arthur Scribner's affidavit, were practically all $10 an acre and from my standpoint the full cash value of the lands could hardly exceed $1.50 or $2; the recited consideration in township 11 north, range 65, were generally $10 an acre. I think the value of lands in town-

ship 11, ranges 56 to 62, is not to exceed $2 or $2.50 an acre; the values in township 10, ranges 56 to 67, are practically the same as this, except where there are reservoirs and springs. The real value of sections 1, 3, and 5, in township 11, range 65, is not, in my judgment, over $2 per acre. It is range land and there are no irrigation works above the land, and no feasible water supply. The recited consideration stated in Arthur Scribner's affidavit is $21,600; my estimate is $1 per acre. I have examined other statements in the affidavits covering sales of land of like character through these townships; the consideration mentioned was usually about $10 an acre, some higher. The assessments on these lands are all practically the same. Higher assessments were made on lands belonging to Warren of Wyoming on which reservoirs or waterholes were located, because they controlled all the surrounding lands. There are a great many instances of discrepancy between recited considerations and actual values of these range lands, described in the affidavits. Pasture and grazing land adjacent to irrigated land has a higher value.

Keota, Weld County, Colorado, is in the midst of a prairie country. In an advertisement in the Keota News published there the government offers the SW¼ SW¼ Sec. 33, Tp. 9, Rg. 59, to the highest bidder, at the minimum price of $2.50." (Rec., p. 295).

"Another isolated tract is lots 2, 3, and 4, SW¼ SE¼ 5-8-59, about 2 miles from the Burlington Railroad near Keota in which the same price applies, minimum $2.50 an acre. There is another one approved by the commis-

sioner of the general land office which is S½ SW¼ 9-8-59, upon which the minimum price is $2 an acre." (Rec., pp. 182, 295).

"East of the Burlington Railroad in the north portion of the county the Lovella Reservoir has completed an outlet ditch, but I do not know of any water being in it or an outlet being built to it." (Rec., p. 295).

"I have visited in the district where some of the other irrigation works are contemplated, and have never seen any indication of a constructed flood water proposition completed or even started. The Lovella is a flood water proposition. I do not know that there is any water for it. Down the Platte the Camfield, Crow Creek, and Platte reservoirs would take the flood water ahead of it." (Rec., p. 295).

"Range lands in the vicinity of the isolated tracts mentioned were assessed at about $1 an acre. The assessment would be higher near townsites, as near Keota and Hereford, where the valuation was $2." (Rec., p. 296).

When such open prairie range sections of land as 1, 3, and 5-11 N., R. 65 W., where nobody lives, and which are unimproved, are used in the affidavit because of the recited consideration of upwards of $10 per acre, the necessity to which the employes of plaintiff are driven to carry the designed point becomes clearly apparent. These lands are in a locality where practically no people live, and are fifteen to eighten miles removed from the nearest railroad station, in a country that is still the abode of antelope and other wild animals of the plains. If these lands were ever pur-

chased for anything like the amount decided in the affidavit, it must of necessity have been, if by a sane person, by one to whom the lands, the locality, and the conditions were practically unkuown, or the consideration paid not in cash, but in kind, in exchange or trade. These affidavits teem with examples of this characters, the full elucidation of which would burden this consideration beyond necessity and patience.

To presume that any such consideration as those stated in the list were ever paid by sane persons,, conversant with the condition, would be violative of the very rudiments of reason, and to presume from this first violent assumption that the lands have a value anything like the recited consideration, even tho it was paid, would be also violative of common-sense. The purpose of this character of testimony must have been, and was, so apparent to the trial court that, instead of being cogent or persuasive of the existence of the fact attempted to be portrayed, it was but an expose of the sham and frailty of the foundation upon which the plaintiff's contentions were based.

Considerations of the numerous examples in the lists like that last mentioned, and the instance where the recited consideration was $47,361 for section 7, Township 2, Range 65 (Rec., p. 60), make clear the reason of Chief Justice Ruger in the case of People vs. McCarthy, *infra*. This class of evidence is not only incompetent, but, if allowed in cases where interested parties select the transfers, and include and exclude, as their interest may dictate or their ignorance of conditions permit, the deductions become a

snare and deception, rather than a guide to actual fact. The truth is that these lands, assessed at $1 to $2 per acre, considered under every method by which value of property is ascertained, were assessed at a far greater percentage of their value for taxation than the property of plaintiff, as is hereafter shown.

This comment upon the weakness and deception of this class of pretended evidence is not urged because it should not have been received, tho the defendant most strenuously objected to all this evidence at the time of trial, and is confident of its absolute incompetency; but because it was this fallacious and pretended evidence that constituted so much of the alleged basis of the plaintiffs' claim that it was and is apparent that, upon this character of testimony alone, the plaintiff based its greatest reliance; and we desire this court, so far as possible, in a proceeding where the testimony is not heard and where the evidence adduced can be but partly understood, to reach as near as possible the understanding and opportunity of judgment afforded the trial court, which, in its discretion, denied the application.

This sort of testimony so made was refuted and overcome by testimony introduced by many of the witnesses in regard to the actual values of the lands described, and as to the variations between the recited consideration and that actually paid, to the extent that, when finished, it was apparent, not only to the court, but to any fair-thinking mind, that this so-called evidence not only failed to show the condition as to the value of land in Weld County, or the lands

mentioned in the lists, but was of no worth whatever as a guide to the value of the assessed property of Weld County.

This character of proof is in fact worthless and incompetent evidence for the guidance of a court of justice on application for temporary injunction or otherwise.

A very similar effort was made as to the showing of values in the case of People vs. McCarthy, 8 N. E., 85 (N. Y. App.), wherein the Court of Appeals of the State of New York held evidence of this character, secured and selected in the same way, percentaged in the same manner, and offered for the same purpose, irrelevant and incompetent.

In the New York case cited the action of the court was upon an appeal from an order of the Supreme Court of New York quashing a writ of *certiorari* issued to the state board of equalization for review of its proceedings in equalizing assessments between the several counties of the state for taxation in 1885.

The appellate tribunal commented upon the fact that the trial court, in the exercise of its decretion, had quashed the writ on the ground that, under all the circumstances, it should not have been issued. The court announced that, altho its decision might have been premised on this ground alone, it deemed it not inappropriate to comment briefly upon some of the grounds of the complaint stated in the petition. Thereupon, as reported at page 86 of 8 N. E., the court proceeds to discuss the fallacies of the character of evi-

dence offered in that case, for the purpose of showing values by selecting deeds and producing a particular result by methods of inclusion and exclusion identical with those employed by plaintiff's agents here.

The reasoning of this opinion is so pertinent to the case at bar that we quote at length this portion of the opinion, condemning this class of evidence as worthless and incompetent.

The court, by Ruger, J., says:

> "If it be true, as alleged therein, that systematic injustice has been done to the city of New York in the equalization of assessments among the several counties of the state by the state board of equalization, and that such result has ben produced 'collusively, unlawfully, and by a sinister and selfish combination and conspiracy of the members of said board against the petitioners and taxpayers of the city and county of New York, to benefit themselves severally, and their several friends and neighbors,' etc., at the expense of the taxpayers of New York, then a great public crime has been committed, and a wrong done which calls upon the proper authorities for prompt investigation and redress. Such a charge should not have been lightly or inconsiderately made, and, if made at all, should at least have been sustained by plausible proof to shield its authors from deserved censure in making it.
>
> A careful examination of the facts stated in the relator's petition, and of the proof submitted therewith, has led us to the conclusion that there was no adequate foundation for

the charges, and that they have been based wholly upon a misconception of the force of the evidence adduced in their support, and of difference of opinion between it and the state board as to the proper method to be pursued in investigation and determinating questions of estimate and valuation by that body. The principal ground upon which the charge is predicated is the claim that the assessed valuation of real-estate in New York approximates more closely its real value than obtains in the other counties of the state, and that, therefore, a proper equalization would reduce the valuation of property in that city instead of increasing it. This claim is attempted to be supported by comparing the consideration inserted in the deeds of certain selected transfers of real-estate in the several counties of the state with the assessed valuations of the same property, and then assuming that the average amounts of such prices and valuations as thus compared conclusively established the ratio of assessments to value prevailing in the several counties of the state where made. We do not think that this assumption, even if it were based upon a comparison of all of the transfers in a particular locality or even of such as could be conclusively shown to have been fairly made, can be maintained. In the county of New York the instances of such sales reported in the relator's petition are quite numerous, and cover a period of time extending over nearly 20 years, altho the assessed valuations with which they are compared are confined to the year 1884. These instances of sales were selected from an almost inexhaustible

number by the agents of the relators, and show great display in the proportion existing between their several assessed valuations and the prices inserted as the consideration in their respective deeds. A large number of instances appear where the assessed valuations are much larger than the prices apparently obtained for the land, reaching occasionally three and four times the amount specified in the deeds; and, on the other hand, still greater disparity is shown between the prices reported in many cases and the assessed valuations,—in some instances the price reported reaching six times the amount of the assessment. It is thus quite apparent that a partial or even careless process of selection would seriously affect the weight of such statements as evidence, and render them particularly objectionable when made by a party *interested in producting a particular result.* The duty of making selections in the city of New York was wholly intrusted to an individual describing himself as 'an attorney and counselor at law," and his specialty as that "of the examination of titles to real-estate.' *His mode of procedure in making the table of prices was to omit therefrom 'such cases as showed a nominal consideration only, and indefinite and clearly inconsistent statements of consideration and assessments, and cases where the assessment was made of property "building in progress."' Such a rule of selection, guided by no knowledge of the facts, and influenced by vague and indefinite inferences, evidently affords the widest scope for the production of any result it may be desired to reach.* The se-

lections in the several counties of the state outside of New York were also made by agents of the relators residing in such counties, and, altho made in apparent good faith, and fortified generally by the affidavits of the persons making them as to their belief in the impartiality of their reports, they could not be accepted as conclusive or even cogent evidence of the facts stated by an impartial tribunal. The assumption founded upon such evidence is, we think, altogether erroneous, and cannot be supported upon any known principle of law or justice in the appraisement of property for purposes of taxation. It certainly is directly in conflict with the scheme of appraisment provided by the statutes of the state, and we believe with settled rules of valuation.

There would seem to be no reasonable objection to the reception and consideration by the state board of the information furnished to them by the relator, to be accorded such weight and influence as they might deem it entitled to; and we have no reason to suppose that this consideration was not given to it; but we thing the relator has ascribed to the information offered an importance altogether disproportionate to its real value when it claims that it shall be regarded as decisive evidence upon questions of value. The sums inserted in the deeds referred to were not authenticated in such a manner as to make them evidence of the actual consideration, even if the price paid on sales of real-estate between individuals should be deemed admissible at all as evidence of value.

We think it quite clear, however, that such price is not in any way competent evidence of value. Bouv. Inst. 1224. No rule of law requires the true consideration to be inserted in conveyances of real-estate, and it is within the common knowledge of all conveyancers that the amount stated therein is often determined by fanciful, capricious and arbitrary considerations which render it utterly unreliable as evidence of value. It is frequently depressed by forced and unnatural sales, and enhanced by fititious values placed upon property transferred in exchange, or deeded in in settlement of disputed claims, or given from considerations of affection, liberality, and duty, and is, at the best, but the opinions of the grantors and grantees of its value, or a declaration by them of the price placed by them upon the property. Such prices have usually been held inadmissible as evidence of value in actions relating to the property, for the reason that they are liable to be influenced by too many causes aside from the actual value to be regarded as competent evidence of that fact. Roe v. Hanson, 5 Lans. 305. Prices obtained upon public sales are, for obvious reasons, considered some proof of the value of the property sold, and are receivable as evidence upon the question of value. Campbell v. Woodworth, 20 N. Y. 499. The usual method, however, of proving, is by the testimony of witnesses who express their opinions under oath as to such value, based upon their knowledge of the subject-matter and familiarity with the circumstances bearing upon the question. Clark v. Baird, 9 N. Y. 183; Greenl. Ev. Sec. 440;

> Whart. Ev. Secs. 447, 448, 449; Lawson's Exp. Ev. 435; De Witt v. Barly, 17 N. Y. 340. Indeed the relator's petition seems to nullify its own claim and convey its own refutation." (Italics ours).

From this language and sound reasoning it is apparent that all this class of purported evidence had little or no weight with the chancellor who heard it, in view of the full refutation and explanation thereof so well established. This testimony, which was the principal testimony offered upon the question of land values, stated to be 60 per cent of the values of Weld County locally assessed, was and is clearly, absolutely incompetent.

Outside of the selected deed system, and the attempted showing by affidavits, and the alleged declarations of the assessor, which were denied, there was no evidence offered as to the land values of Weld County in 1912, except the testimony of two promoters of irrigation works—Daniel A. Camfield and Theodore C. Henry.

The witness Camfield, though having residence at Greeley, is in Weld County a small portion of the time, being engaged at Denver, Chicago, and New York City, in the attempted promotion of large irrigation schemes, and had little or no contact directly with conditions.

The witness Henry resided in the city of Denver, and had been in Weld County practically not at all for a great many years prior to 1912.

Neither of these witnesses operated any lands in

the county, and both gave but general statements of promoters' conclusions of high value necessarily in accord with their tendencies and practice of exaggeration indulged for years, until this second nature had become fixed as the natural offspring of engagement in their special line.

The witness Camfield first concluded that, because the assessor had found and assessed 266,000 acres of irrigated land, with the assistance of his plat books and his corps of assistants, in the discharge of his duty, the total number of irrigated acres in Weld County was probably 300,000, and that the average value per acre of this land, with water rights attached, was in his opinion $100 per acre.

The witness Henry did not attempt by any means of deduction to enlighten the court upon the number of irrigated acres served, but, without a knowledge of the different priorities of the different ditches, their water supply, and needs of the lands dependent, fixed an opinion of average value per acre of $110 to $125.

Just what particular territory of the irrigated area the witness Henry included in his mental scope is delightfully uncertain and indefinite, though he did admit that the selling price of the highest class of irrigated lands in Weld County, though not of greater value than the highest class of irrigated lands in the valley of the Arkansas and elsewhere in Colorado, sold generally higher than the last-named class.

We consider the conclusions of these gentlemen separately and in detail:

Witness Camfield testified (Rec., p. 242) that his business has been farming and stock-raising, and that he is now principally engaged in building ditches. He is president of the company endeavoring to build the works for the Greeley-Poudre Irrigation District. He testified that the value of the 90,000 acres of deeded land out of the 125,000 in the Greeley-Poudre District was on an average $30 per acres in 1912.

This witness also stated that it was his belief that the assessor did not assess as irrigated acre the land in the irrigated area devoted to rights-of-way for roads, ditches, barn-yards, etc. (Rec., p. 244), but that these were in each instance deducted. This was shown to be clearly erroneous (Rec., p. 363), as nothing was deducted for roads or any of the said areas. Witness got his information from the Greeeley Commercial Club The value of property in Weld County in 1912 was less than in 1908, 1909, and 1910 (Rec., p. 245). The decline in property prices was much greater at Pierce and Nunn(in the Greeley-Poudre District) than elsewhere (Rec., p. 246), for reasons (palpable) other than failure of the potato crop.

The lands in the Greeley-Poudre Irrigation District (which witness estimated worth $30 per acre) are still what we call in the virgin state, except some dry-farming (Rec., p. 247). In the district are 125,000 acres (deeded and government land, all told), bonded for $5,100,000, or $40.80 per acre. The district lands are largely range land; if not irrigated, they have not sufficient value to sustain the bond burden of $30. There has been nothing done on these works for about

one year, and the works on the Laramie River side, as well as on the Poudre side, are not finished anywhere. To finish will take over $1,250,000 cash. Proceedings in court to declare the building company bankrupt (Rec., p. 247). There are in default about one year's interest coupons on $2,610,000 of the district bonds, and witness thinks they would default again December 1, 1913, unless agreement to the contrary should be made. Unless work is completed, the land values will not be equal to the bond burden. To give the lands value, they should have water supply from the Laramie River as well as other supply (Rec., p. 248).

The printed record shows this witness to have testified that without Laramie River water the lands would have sufficient water supply for that number of acres. The witness actually testified the lands would have *insufficient* water supply, and we respectfully refer the court to the original record (pp. 393 and 394).

The district is suing the bonding company on the construction bond.

To rehabilitate the broken enterprise, different plans have been put forth without avail, and at the time of the testimony all were off; but the witness's company was still hopeful of getting another plan, which witness believed would be successful, under which hopeful scheme there was contemplated the issuing of $500,000 more of bonds (Rec., p. 248). If the lands remain in the condition they were in 1912, when the witness testified, they could not bear the bond burden. Part of the works called the Poudre Valley Ditch is bonded for more than $125,000, in addition to district

bonds, and are in default. Foreclosure of these bonds means the loss of a necessary part of the works to the district of this ditch, which is the means of conveyance of the whole water supply from the Poudre River to the land. Some of the district water rights on the Laramie River sold under mortgage foreclosure, and some more are subject to mortgage. These water rights were to aid the district in getting water, if it ever gets the work done (Rec., p. 248). There is also outstanding against the district works a bond issue of the witness's company amounting to $188,000, with interest in default.

The Greeley-Poudre project is an absolute failure and ruined beyond re-establishment, as is apparent from the testimony of this witness, and more clearly shown by that of the secretary of the district, F. M. Eastlack (Rec., pp. 382-383).

In face of all these conditions, the witness was of such good cheer and hope that he expressed an expectation to see all the works done within eighteen months, except a reservoir; also a part of the district system, which he seemed to think would be completed within two years. The witness admitted, however, that to do all this there must be a new plan agreed upon with his company, or some other; and, of course, it is apparent to any person that agreements won't build, but the finances for the broken concern must be secured.

From this testimony of Mr. Camfield it is apparent, as it was remarked by the court, that his values are promoter's values. He doesn't farm, and stops in the territory only occasionally. His whole business,

life, and environment lead him into realms of speculation and exaggeration, especially of values of the land upon which bonds must be sold for ditch constructions.

Every man is made by his environment. The cause brings its effect. As a farmer is the practical man, the promoter is the theorist. So it was and is with Mr. Camfield; his honesty is unquestioned, but of necessity and practice he sees alone the bright side and the rosy tints, until lands covered only with cactus and bonds reach $30 per acre, no matter what the surrounding conditions of adversity. Such loose opinions, upon such lack of foundation in reason, are far from a guide of safety upon which to place dependence.

This natural tendency toward exaggeration, of course, is the most likely to find expression in overstated values of lands under these new and broken projects wherein the witness is the most interested, and upon which there must be levied, and even sold, new and further issues of the bonds—the principal part of the promoter's art.

This is made manifest by the fact that, in the face of the difficulties surrounding this unfortunate Greeley-Poudre, he testifies the land had a value of $30 per acre in 1912. Undismayed by the fact that the works are but partially completed; that the work has been stopped for over two years; with water supply, if the work should ever be completed, in jeopardy and likely to be lost; (Wyo. & Colo. suit) with over $2,500,000 of bonds out, and interest defaulted; with $125,000 more of bonds in default on an essential portion of the system, with $188,000 more defaulted bonds upon

his bankrupt company and the district works; with two or more plans of rehabilitation of the broken scheme a failure; with all plans then off, except one of hope, involving an additional burden of $500,000 of bonds to pay interest defaulted alone, and the necessity of a bankrupt institution raising over $1,250,000 cash upon this scheme—this witness estimates the value in 1912 of the grazing lands, fit for nothing else until all these hoped-for things, so difficult of accomplishment, should materialize, at $30 per acre.

It is apparent to any well-balanced mind that, to re-establish this broken system, it would be necessary not only to make agreements and contracts, but to raise finances—a work, in the face of the embarrassments and bankrupt condition of this enterprise, practically impossible. The worth of opinions of witnesses such as this can be only in a measure weighed by the character of statements made in connection with the opinions given, and such witnesses must be seen and heard for a court really to fully understand their good cheer, high hope, and natural tendency to exaggeration, instilled by their habits, business, and surroundings, unto becoming part of their very being.

Attention is called in particular to the opinions and generalities of the testimony of the witnesses Camfield and Henry, because it is given such reliance, and has been so enlarged upon, in plaintiff's brief.

Then comes the witness Henry, of extended experience in matters of irrigation, water rights, construction of irrigation works, and dealing in irrigated lands. (Rec., p. 388). In the promotion of these projects and

developments of these schemes he gained experience from which he thought himself capable to describe the productive and commercial value of irrigated land and irrigation rights.

This witness estimated the average value of irrigated land in Weld County in 1912, exclusive of the Henrylyn, Greeley-Poudre, and like new irrigation districts, and also excluding seep land and land under ditches not irrigated, with the water rights attached, at from $100 to $150 per acre.

He knew of instances in the Greeley neighborhood of values above this amount, and, if capitalized at 6 per cent, justified $200 to $250 per acre.

This witness did not enlighten the court as to just what lands he referred to, or as to over how large a territory the high valuations extended.

It is apparent from the testimony (Rec., p. 389) that this witness had no knowledge as to the conditions under any of the irrigation works, nor had he knowledge of the cost of the maintenance and operation thereof. He did know of, and apparently had in mind when he testified, the so-called Pleasant Valley district—the very best water-served territory and the highest-valued land in the county; and, with that measure, his natural and expected tendency as a promoter, was to value all the lands at this standard. He states practically that his knowledge of conditions was from general repute, rather than from conversance with the facts, and asserts that a person does not necessarily have to be possessed of an understanding of all the cir-

cumstances to have an idea of the general value of water rights. Apparently the witness was giving his ideas simply of general values, without reference to any particular case or fact.

This witness did at one time, when initiating the Henrylyn project, investigate returns on agricultural lands in that section of Weld and near Barr Lake, when it was important to determine whether the outlay would be justified by the burden necessitated. At the time of the testimony he was projecting an irrigation development on the lower Arkansas, as was his companion witness, Mr. Camfield, in Poudre Valley. It is not surprising that witnesses such as these see all conditions and values on the brightest side, and for true guidance to the actual values are not to be relied on, unless their high estimates and generalities are divided by two.

This witness stated that. because of general reputation, lands in the Greeley district were held at higher prices than those of similar quality in other parts of the state. (Rec., p. 389).

Thus it appears from the record, as it was made manifest at the hearing, the whole showing made by plaintiff as to land values in Weld, in 1912 (60 per cent of local assessment), was by affidavits in the main concerning selected transfers, and recited consideration, incompetent as evidence, as we have shown, and the generalities of opinions of two promoters without actual knowledge of the conditions described.

The testimony of plaintiff as to land values and all conditions were met and overcome by the evidence

of persons who made the assessments and had knowledge of the values, both from sales and from contact with and understanding of the condition, capabilities, and returns obtainable from the use thereof.

The assessor of Weld County in 1912, A. R. Fischer, was aided in his work by a corps of sixteen deputies, all of whom were residents of the county, and conversant with the values and capabilities, in the way of returns and selling price of the lands and properties in the several localities and districts in which they respectively made assessments.

These deputies were by the assessor first directed, so far as possible, to interview all taxpayers they might find within the taxing district of the county allotted to them, and to ask all questions printed upon the schedule, and, in fact, to make due search and inquiry both from the taxpayers interviewed and from inspection and investigation of the property possessed.

All of the property of the taxpayers of their respective districts subject to assessment they were to list, not at the estimated value given by the taxpayer, but to fix this in every intance from their own knowledge, as well as from what they could learn from the owner or persons familiar with it, and to assess the property assessable, and use all means within their power to ascertain the full amount possessed by the taxpayer, and to avoid omissions. They were instructed to first value the property assesed at its full value, and in cases of claimed exemptions, where the same were made to appear, first they valued at full value and then deducted from this total $200, as allowed by the

statute, and no more. These deputies were instructed to put taxpayers under oath when interviewed, and to examine them as to moneys and credits, and, in fact, as to all property owned by the taxpayer and subject to taxation. These instructions, as shown by the testimony of Fischer and the testimony of a large number of the deputies, and the affidavit of others, were strictly followed in making the assessment. This fact was proven by every deputy who testified, and by the affidavits of a number of those who did not; was denied by no witness, and by no evidence, and not assailed except by inference and insinuation.

These witnesses and each of them testified that they examined under oath the several taxpayers interviewed as to any moneys, credits, notes, accounts, deposits, watches, clocks, jewelry, and the like, and that in every instance where they found the answers untrue they assessed the property they found; and they also testified they did in their judgment ascertain, list, and assess for taxation in the aggregate of their return all the property assessable by the county assessor in their several divisions of the county.

These deputies clearly showed that they were fully conversant with property valuations in the districts wherein they listed and assessed, and that the property was assessed at a full one-third of the value thereof, and that no property escaped assesment, except such minor omissions as are necessarily incident to such an effort.

It was shown by the testimony of these deputies, by the assessor, and the other witnesses who testified,

that the selling price of farm land, with their water rights and improvements, was much higher in the years 1909 and 1910 than it was in 1912.

It was also shown by the deputies and others that all property locally assessed was assessed at a value of not less than 33⅓ per cent of its market value.

It was fully established by the affidavit of John C. Mosher (Rec., p. 102), and by the testimony of the deputies who did the work of assessing in that portion of the county known as the "Potato Belt," that there was a complete failure of this principal and most remunerative crop in the "Potato Belt" in 1911, from which, from 35,000 acres of potatoes then in crop, instead of a normal yield of 10,000 carloads, there were gathered less than 1,000 cars; that again in 1912, from a crop planted upon 20,000 acres, there was another failure, and it was further shown that this failure of the potato crop—one of the principal, if not the best-paying crop of the county—resulted in an adverse effect upon the market value and selling price of lands in the county; that it rendered the farmers unable to meet their bills, made them borrowers at the bank, and produced like effect upon the merchants who were compelled to carry them.

This condition was so marked in its influence that, according to the testimony of a number of the defendant's witnesses, as well as some of those who testified for the plaintiff, the depression decreased not only the value of property, but the population of Greeley, Eaton, Ault, and all the towns and villages dependent for their

support upon the agricultural success of the irrigated territory.

For example, from the testimony of witness Campbell, who during that time was cashier of the bank at Pierce, that out of the $50,000 upon deposit there, $40,000 was there upon deposits belonging to non-residents of Weld County, and that like conditions prevailed at Eaton and Ault in regard to banks of his knowledge. (Rec., p. 348.)

The following witnesses testified that the value of the irrigated lands of the county in 1912, with improvements, including water rights, was from $50 to $60 per acre:

S. J. Peery (Rec., p. 386), a man who for years had bought, sold, and operated irrigated lands throughout Weld County; Alex Walker (Rec., p. 336), a man of long experience as a farmer, and with full information as to the selling and return values of such property; C. M. Ireland (Rec., p. 372), a man who has lived since 1878 in Weld County, and purchased, operated, sold, and rented lands therein, and who rented land from the Union Pacific in Weld but a short time ago for grazing purposes, at $13.80 per section per annum; E. S. Schoonover, a man who has lived in Eaton for twenty-three years, owned and operated farm land (Rec., p. 331); F. W. Wylie, a man who has lived near Platteville for twenty years, and is well acquainted with the ditches, reservoirs, and farming lands of the entire county (Rec., p. 314); J. C. Campbell Rec., p. 343), one of the deputy assessors, testified that the value of lands in the neighborhood in which he assessed in 1912 was

in his opinion from $45 to $60 per acre, and that they were assessed by him at not less than one-third of their actual value.

The deputy assessors testified without exception that they assessed the water rights with the land, and that the value they placed upon irrigated land was in each instance the value of the land and the water rights serving it; the improvements were assessed separately and in addition, and the area taxed was the full area irrigated, allowing no deductions for rights-of-way for highways, ditches, laterals, or space occupied by corrals and buildings.

X.

NON-IRRIGATED LANDS.

It was clearly shown by the evidence of the witnesses for both plaintiff and defendant that, outside of that area under the old-established ditches where there is assessed, as shown by the abstract of assessment, an aggregate of 266,000 acres of irrigated land, all lands, whether under projected ditches or systems in course of construtcion, sand-hills, or hard soil, were employed as, and are fitted for, and have only value as, ranges, with the exception of a very few dry farms.

Many of the examples of disparity between selling prices and assessed valuations were of selected sales shown by chosen deeds of these lands.

While it was impossible to make clear, by testimony of witnesses conversant with each tract, that the value of this land was, as it in fact is, not anywhere near

expressed by these alleged considerations, it was made manifest throughout the hearing, by an abundance of testimony, that all those range lands had a value in 1912 of not in excess of $1 to $3 per acre.

This was shown by the testimony of witnesses who knew the conditions; by the admission of the general government offering it for sale; by the rental received by the State Land Board for school lands; by the rentals paid for lands of homesteaders, after final proof and departure of the entrymen; by rentals charged and received by the Union Pacific, as well as by the return values by use of the land by persons actually engaged in the only business for which it is fitted—grazing live stock in summer in small numbers upon large areas.

To assist the court in approaching an understanding upon this matter, such as was had by the trial court, we call attention to a few of the well-established facts shown by the record:

Defendants' Exhibit 3 (Rec., p. 182) shows an advertisement in the Keota News of certain lands belonging to the government, offered for sale at a minimum of $2 to $2.50.

Charles Wait leased part of section 36, Township 3, Range 63, in 1910, at 5 cents per acre, from the State Land Board, after having abandoned the contract upon which he had purchased the same from the state. (Rec., p. 329.)

C. M. Ireland leased lands for grazing purposes from the Union Pacific Railroad Company for $13.80 per section per annum. (Rec., p. 732.)

Scott Davis, live-stock agent for the Union Pacific, testified that homesteaders, after final proof and desertion of the lands, ordinarily rented the same at $10 per quarter-section per annum. (Rec., p. 284.)

All of the lands beyond constructed and operated ditches are identical in character as to aridity and capability, as shown by the testimony of the witnesses above referred to, both for plaintiff and defendant, and as is further manifest by the constructions of these extensive and expensive works, so costly in upkeep and operation, to reclaim from desert to productive land.

Witness S. J. Peery and many others testified the value of these lands to be $1 to $2 per acre. (Rec., p. 286.)

The plaintiff offered no evidence as to the utility of these lands in refutation of the irrefutable fact that they are fitted only for grazing of stock and that large area is required for a small number. In fact, the plaintiff produced no evidence that could be made the foundation of the contention that these lands have any value in excess of $1 to $3 per acre, except the selected deeds with recited considerations vastly in excess of their known values, which were exampled without limit; and without any testimony to show that the values were in accord with the alleged considerations, for the apparent purpose of leading by mathematical deduction to the erroneous conclusion that land values in Weld were assessed at from 15 to 20 per cent of their actual value in 1912. This can be made only partially apparent to a court not hearing the evidence, and it is therefore that we urge a careful scrutiny and study of the record.

This sort of evidence, which could misguide none who heard its recital and saw the witnesses, was introduced after about two years' inspection by defendants in Weld County, by the expert agents in the employ of the road as tax commissioners, whose entire labors were devoted to the production of evidence to procure the desired end. The fact of this absence of substantive proof, and the resort to this makeshift practice, by means of the inclusion and exclusion system, makes clear and apparent the absence of a sound basis for the establishment of plaintiff's position.

This purpose and practice becomes the more manifest when we reflect upon the fact that the tax commissioners in the selection of the deeds to produce the 15 per cent result could have easily found records of their own company showing rental of the same character of land in recent years for $13.80 per section per year, and the further fact, as was shown, that the records of their company also show repeated sales of the same lands in the same condition, which they had automobile facilities for viewing, at prices ranging from $1.25 to $2.50 per acre; the lands being in exactly the same condition, used for the same purpose, as when such sales were made. It seems to the undersigned that in order to interfere by injunction with the collection of the public revenues for the discharge of the duties of civil government, the charges of fraud and impropriety set forth in the bill ought to be sustained by something nearer the semblance of evidence.

It must be admitted that, in the assessment of a county of the extent and area of Weld, with its various

kinds and classes of property, there were of necessity in 1912, as in other years theretofore, and as there will be hereafter, omissions of property which should have been assessed, under assessments of property, over-assessment of property, and even the assessment of property which did not exist, or to which title had not yet been obtained; for, attendant upon such assessments, of necessity there always are, and must ever be, errors, omissions, underassessments, and overvaluations. Exact equality of tax burden, though the effort of ages, is a thing attainable only in theory, and approachable only by approximation. This is a recognized condition, as by the statute law in this state there are permitted assessments in after-years of property through inadvertence or otherwise omitted from taxation in a given year. Some instances of this necessary variance from the true line designed by the Constitution and laws of Colorado of impressing an equal and equitable burden upon all property values, doubtless did exist in the assessment of Weld County for 1912 but nothing, it is confidently contended, was in any respect portrayed to show that, attendant upon the assessment locally made in Weld County in the year in question, there existed such conditions as were alleged in the bill.

In fact, when the question is considered in the light of all the evidence shown upon this hearing, it becomes manifest that, if any part of the taxable property of Weld County escaped its just portion of taxation burden in accordance with its values in 1912, it was the property of the plaintiff, which was assessed, in ac-

cordance with the testimony, not conformable to the statutory demand, but in open and flagrant violation thereof.

XI.

UNION PACIFIC UNDER ASSESSED.

The property of plaintiff in Weld County, taxable in 1912, consisted of 198.23 miles of the 6,678.29 operated miles of railroad of the Union Pacific System, together with the rights, franchises, privileges, and attendant values necessarily considered in the work of impressing thereon, according to its value, the proper burden of taxation, to conform to the Colorado constitutional command of uniformity of payment between all classes of property within the jurisdiction of the authority levying the tax.

This property in 1912, as compared with levies and assessments upon other property assessed in that jurisdiction, was undervalued and underassessed.

In the assessment of this property the Constitution and statutes of Colorado and of the United States were violated, and the methods known and approved, established by experience and judicial authority, as best adapted to secure a proper estimate of railroad values, were evaded, avoided, ignored, and circumvented in such way—tho there remained a pretense of conformity therewith—as to amount—to an absolute evasion of the known approved methods of valuation, resulting in an undue reduction in the assessed valuation of it in 1912; whereby the plaintiff escaped the pay-

ment of its just and rightful portion of taxes in the County of Weld, and thereby unjustly overburdened with taxation the property of Weld County locally assessed.

Uniformity of taxation, no matter by what rule or scale of determination the burdened values are considered, or whether by all of them together, means equality of burden according to value. By artful evasion of this measure of determination, the plaintiff has escaped its rightful payment and has shunted upon other payers of tax an unjust portion of the taxation burden.

The plaintiff asserts that it is in a quest of equity —the equity of equality in the burden of taxation. Among the rules of equity we recall that those who seek equity must stand ready to do equity; that equity views, not the form, but the substance, and that, therefore, in the establishment of this equity of uniformity of taxation burden, under the benign principle announced in the Constitution of Colorado, we must impose the burdens *ad valorem*. It must be measure for measure, and, so far as possible, the values weighed in a scale that balances alike for every character of property and every payer of tax.

To determine whether this property was rightly burdened in a given year for the purpose of taxation, it is necessary carefully to consider, first, the physical conditions of the Union Pacific System, of which the mileage mentioned is a fractional part; and, second, the method employed to arrive at the conclusion of assessment imposed.

These are matters, not simple, but intricate; difficult of understanding, and in the hands of experts, interested and trained thru a life of practice, easily handled in a way to obscure and cover values which by every rule of equity ought to make their rightful contribution to the support of the government that protects them.

We first proceed to a consideration of the great system of this so-called public servant, which here seeks to master the highest function of government in the levy, assessment, collection, and equalization of revenues; and to correctly determine the question as to whether the fractional portion of that system extending thru Weld County was underburdened in 1912; to ascertain the value of the operated railroad mile; and, in doing this, to consider the average number of railroad miles operated, the uses to which it was put, the manner of its uses and interdependence, the income gained, and the value attributed to it by those dealing in its stocks and securities on the marts during the year preceding the assessment.

XII.

UNION PACIFIC SYSTEM.

The Union Pacific System, as described in the schedule and by the testimony of its tax commissioners in 1911 and 1912, consisted of a combination of lines united into one great transportation unit, including trunks, branches, and feeders, of the Union Pacific proper, the Oregon Short Line, and the Ore-

gon Washington Railway and Navigation Company; together with all of the branches, spurs, feeders, stations, equipment, steamship lines, and connections constituting one giant plant, so combined and operated as to carry on intra- and interstate commerce, conveying freight and passengers, in long and short hauls from the many marts of trade and industry of every conceivable character tapped and served by the giant plant. It is one entity, working as a unit, under one management, unseparated and inseparable both in the expense of operation and the incidents of income; no part was or could be segregated, for every part of the profit-producing, commerce-serving unit was and is both intra-and interdependent, a necessary feeder for and distributer of the business gathered, carried, and discharged by the remaining parts of the system.

Every part of the great transportation unit, from terminals on the Missouri to wharves and steamships on the Pacific, with its countless branches, its rolling-stock, and equipment contributing and adding to the wealth and value of every other dependent portion, all together with the franchises, rights, privileges, and advantages of the system affiliated, related, and working together, was and is so dependent upon every other part that the uses and values attach and run concomitant with every mile.

Its every mile is dependent upon every other, with no existing circumstance or condition allowing of the segregation of values, earnings, income, or operation

of that portion of the system extending within any state or within any county.

The property can only rightly be valued or assessed upon a mileage basis. This is the contemplation of the Colorado statute. It is the ordinary custom, and the method recognized by plaintiff and its expert witnesses. For the determination of the value of an operated mile of track, with sidings long or short, many or few; there are two methods approved by practice and sanctioned by judicial authority as best calculated to arrive at the full taxable value of those fractional parts of such a corporate entity.

These methods are:

The stock and bonds method; and

The earnings method.

When rightly employed, they are expressive of the true conditions and rightful values; when distorted, they become the tool of deception.

XIII.

STOCK AND BOND METHOD.

The stock and bond method is a mode devised to ascertain the value of an operated mile of such a system of railroad by determination of:

First—The aggregate value of all the outstanding stocks and bonds of the entity, as estimated by those dealing therein;

Second—Deducting from this aggregate any values not engaged in the business; and

Third—Dividing the remainder by the average number of operated railroad miles during the period priced.

The remainder is the value of the operated railroad mile.

XIV.

EARNINGS METHOD.

Under this method there is to be taken:

First—The gross income of the system in a given year;

Second—The gross expense of operation during the same time;

Third—Subtracting from the gross income the gross expense, and dividing the remainder by the number of operated railroad miles, gives the net income per mile of each operated mile; and

Fourth—Dividing this net income by 6 or 7 per cent, as the case may be, and multiplying the remainder by 100, gives the value of the operated railroad mile.

XV.

COLORADO STATUTES.

DIRECT VALUATION OF RAILROADS ON MILEAGE BASIS.

Under either method above defined it is necessary, under the statute of Colorado, that statements for the basis of calculation be made, covering the con-

ditions during the year preceding that for which the tax is to be levied.

It is apparent that upon the integrity of the statements and rigid adherence to the rules alone by the tax officials can a conclusion that is correct be attained by the employment of either system.

Under either method it is necessary, to secure the result of a rightful assessment, that the average number of operated miles be correctly given by the corporate owner, and that the taxing officers be not dissuaded to abandon its use and employ a higher number; for, as the miles extend, the result of value for each mile proportionately declines.

This was so well understood in the case at bar that the average mileage of the operated system in 1911 of 6,678.29 was endeavored by the schedule and the tax commissioner to be extended to the amount in being on the 31st day of December of the year, to-wit, 7,084.52; and even yet this was swelled by the addition of 751.54 miles of second track, which was the amount believed to be employed by the Tax Commisison, as expressed by Celsus P. Link, one of the tax commissioners.

Under the stock and bonds method it is necessary, first, to rightfully determine the average market price of the outstanding stock and outstanding bonds; for, if this be understated, the aggregate value of the property before the deductions are made will be lessened, and therefore, after the deductions, the value of each mile is less than it would be if the stock and bonds were given their full average and aggregate value.

This was so well understood at the hearing that both in the schedule and from the testimony of the plaintiff's witnesses the value of the outstanding stocks and bonds of the Union Pacific was given as shown by the testimony of the witness Ryan for defendant (Rec., p. 380), hereafter shown, at an aggegate value less by several millions of dollars than the actual value of the same.

It is next necessary, in arriving at the correct conclusion under the stock and bond method, that no properties be included in the deductions not properly there, and that any proper deduction shall not have its value swelled; for any improper entry in this column of an improper deduction, or the inclusion there of an excessive price, will necessarily increase the amount subtracted from the aggregate value, thereby decreasing the amount of the remainder, and consequently the value of the operated mile.

That this was well understood is apparent from the liberal deductions in the schedule of properties wholly improper for deduction, in the nature of cash amounting to over $67,000,000 in one item, $27,000,000 in another, and the round figure of $4,000,000 for water-line properties used in transportation, as the locomotives and equipment of the road, indulged and permitted by the Colorado Tax Commission in its most remarkable liberality to this public servant, shown by these conditions to be a master, not only of its lines, but, by mortgage and otherwise, of many of the main trunk lines of the country, and which here seeks to control the taxing power of the state.

It is well here to consider that upon this method, if the deductions are to be allowed without limit, the more cash such a corporation has upon deposit, (which its tax commissioners know not where pays tax,) the less contribution is made by the corporation to the government extending it franchise and protection.

Earnings Method.

Under the earnings method, assuming that the gross income and expense are rightly given, it is necessary (in the employment of the same, for obtaining equity and equality of tax burden) that the capitalization be at a rate of interest conformable to that of the average return by the employment of the class of property with which the comparison is made as to uniformity of tssessment.

For example, to accord an income rate of 8 per cent under this method would be unjust in the case at bar, in view of the testimony, so amply given thruout the record, without denial, that the values established upon other properties in this comparison were on a basis as low as 6 per cent.

It is therefore respectfully contended that, upon a property such as that of this corporation, with its certitude of return of 10 per cent upon its common and 4 per cent upon its preferred stock, and an excess annually deposited in and augmenting the millions of dollars on hand, and the hundreds of millions of bonds of other corporations, as shown by the record (p. 222), any percentage in excess of 6 per cent

would be manifestly unfair, unjust, and inequitable in determining these values under this method of calculation.

There is also noticeable from the testimony the peculiar circumstance that in the giving of the data and their consideration by the Colorado Tax Commission for the assessment in 1912, in every instance as to the average price of stocks and bonds outstanding the number of operater miles, the amount and character of deductions, as well as the rate of interest employed in capitalization, were all erroneously indulged by plaintiff and the Colorado Tax Commission in fixing the values favorable to the servant; and that finally, unsatisfied by this laxity of method because producing too great a value per operated mile, under either the stock and bond or earnings method, another peculiar, impossible, and heretofore unknown scheme of valuation from the alleged income of Colorado mileage, (admittedly from the record impossible of ascertainment,) as arbitrarily given by the auditor's department of the plaintiff, was employed to the end that a result abortive of the statute and of every principle of reason was secured, undervaluing the railroad property, and thereby violating the statute of Colorado, to the benefit of plaintiff here seking equity, and to the undue burden in the payment of tax upon the taxpayers of Weld County locally assessed.

The methods established by custom, sanctioned by authority, and demanded by the statutes of Colorado were ignored and avoided by the Tax Commission, (according to the sworn testimony of Mr. Link;

tho that official promises the practice will not again recur, for there is intent hereafter to obey the law. Rec., ppp 258, 250).

An honest compliance with these methods of determination of railroad values on the mileage basis is not violative of any provision of the Constitution of the United States, the laws of Colorado, or any tenet of justice; nor does it amount to imporption of any values extending outside the state, as we shall hereafter observe.

XVa

SCHEDULE OF UNION PACIFIC.

We now proceed to consider the value of the Union Pacific operated mile in 1911, as shown by its schedule, under the stock and bond method and earnings method, and the open and flagrant violation of the law in the assessment thereof made by the Colorado Tax Commission in the year 1912; in undervaluing the outstanding stocks and bonds, allowing excessive deductions and excess of operated miles, and, in addition, employing an illegitimate so-called earnings method for the state of Colorado impossible of segregation from the earnings of the corporate entity; as well as to consider the rightful assessment which should have been made, as shown by the schedule under the earnings sytem, and therefrom to demonstrate that which is apparent, that the railroad property in

Weld County in 1912 was assessed at approximately and not in excess of 20 per cent of its value.

The schedule as filed, recites *inter alia.*

		Av. Mkt. Val. 1911	Total Val.
U. P. R. R. Co., common	$216,646,300	173	$374,798,099
U. P. R. R. Co., preferred	99,569,300	91⅞	91,479,294
O. W. R. & N. Co.	1,500		1,500
Total stocks			$466,278,893
Bonds			329,232,380
Total stocks and bonds, market value			$795,511,273

This statement is in error, as the market value of Union Pacific common as determined by the average of the closing prices for each market day of 1911, was shown to have been $175.306 per share, and the average market price of preferred stock, instead of being $91⅞ per share was $92.676; and the average market price of the bonds of the Union Pacific was understated, for the price in that year ranged from over $104.68 for convertible 4's to $96.98 for refunding 4's. (Rec., p. 380).

Therefore, the schedule should have recited, without counting any addition for the undervaluation of its outstanding bonds, as follows.

		Av. Mkt. Val. 1911	Total Val.
U. P. R. R. Co., common	*$216,646,300*	*$175,306*	*$379,793,962*
U. P. R. R. Co., preferred	*99,569,300*	*92.676*	*92,276,844*
O. W. R. & N. Co.	*1,500*		*1,500*
Total stocks			*$472,072,306*
Bonds			*329,232,380*
Total stocks and bonds, market value			*$801,304,686*

The schedule further recites deductions claimed, as follows:

Auxiliary stocks owned	$ 41,922,865
Investment stocks, as per list	255,281,144
Bonds owned	36,283,540
Land assets	3,981,660
Water-line properties	67,745,28
Cash and demand loans and time deposits	67,745,285
Advances for construction of new lines and steamships	27,694,499
Total	$436,908,993

Clearly, this deduction list is erroneous, in so far as it works to minimize the railroad property by deduction of $4,000,000 for water-line properties, $67,745,285 for cash and demand loans and time deposits, and $27,694,499 of cash advanced for construction of new lines and steamships.

These moneys and credits are all a part of the railroad property.

The $4,000,000 is a round number, which its tax commissioner thought should be included as a deduction because the auditor had estimated that the company had properties of this value used in connection with the operation of the road.

The $67,000,000 and the $27,000,000 items were used in the business of the railroad, and are cash accumulations out of the earnings.

From all that appears in this case, no tax is paid upon these items, and as appears from the testimony of the witness Scribner, the cash items are annually swelled by additions thereto from the earnings of the road in excess of its dividends.

If these excesses of earnings had been paid in dividends upon the stock, preferred or common, or both, the necessary result would have been the rise in the value of stock and the increase of the aggregate value of the oustanding stocks and bonds of the system, and a decrease of the total amount of these swelled deductions, whereby the market value of the railroad would be much increased.

Excluding these improper deductions from the schedule, the total deduction should have been not more than $337,469,209, and the aggregate market value should have been in excess of $463,835,477.

The average number of operated miles, according to the schedule (Rec., p.168) and the testimony of C. S. Stebbins, (Rec. p. 196) and of Scriber (Rec. p. 225), was 6,678.29.

This leaves the value of the average mile of the railroad $69,445.

It was assessed in 1912 at $13,183 per mile, or 18.98 per cent of the actual value per mile.

Though it is also stated in the schedule that the miles of main track, as elsewhere explained, December 31, 1911, were 7,084.52, and the miles of second track 751.54, and the Tax Commission, in its remarkable liberality in the assessment, used a figure for actual operated miles of something like 7,900 (Rec., p. 257), *the actual average operated mileage was 6,678.29*

Admitting, alone for the purpose of this argument, that the price of outstanding stocks and bonds of the Union Pacific was correctly stated in the schedule, which it was *not*, and that the deductions should be allowed as they were, which they should *not*, the value per mile of the 6,678.20 miles of the Union Pacific System in 1911 was $53,696, and, as it was valued at $13,183, it was valued at 24.55 per cent of itsactual value.

This is, of course, assuming that the Tax Commission, as to the average miles, followed the declaration of the railroad and complied with the law. This the commission did not do. This, in the absence of any showing of peculiar circumstances, which were not and could not be established, it was the duty of the Tax Commission to do.

Valuing the railroad according to the schedule, with the common stock valued at $175.30 and preferred stock at $92.67, as proved by the testimony to have been

the value of the outstanding stocks and bonds of the railroad company, and excluding from the deductions the $67,745,285, the $27,694,499, and the $4,000,000 items, the value of the operated mile was $69,454, and the assessment made was only 18.98 per cent of its actual value.

XVI.

CAPITALIZATION OF INCOME.

According to the schedule (Rec., p. 168), the total income from Union Pacific System in the year ending June 30, 1911, was $88,893,107.81.

The total operating expense was $49,807,833.99.

The net earnings, therefore, were $39,175,273.82.

The net earnings per mile was $5,866.06.

Dividing this by 6 to obtain 1 per cent of its valuation on the 6 per cent basis, and multiplying the result by 100 the value *per mile of the railroad under the earnings method, is $97.767;* capitalized at 7 per cent, *it is $83,800;* and capitalized at *8 per cent, it is $73,325.*

If we capitalize at 6 per cent of the income, we find that the average value of the operated mile of the Union Pacific in 1911 was *$97,767; and, if assessed only at $13,189 per mile, the same was assessed at 13.49 per cent of its value.*

XVII.

COLORADO EARNINGS IMPOSSIBLE OF SEGREGATION.

The plaintiff advanced the theory that there could be separated in a system such as this the net earnings and expenses, and therefrom obtain the net income per mile of the road in Colorado.

This as a basis for the claim that the value of the operated main track mile in Colorado should be ascertained (irrespective of the Statute of Colorado) without reference to its interdependent relation to the other miles of the system, and as foundation for the claim that the main track mile in Colorado should be assessed lower than other main track miles of the System. This is an impossibility, for the reason so often announced by the Supreme Court of the United States and other courts of that jurisdiction, and from facts so apparent from consideration of the conditions surrounding the enterprise.

With shipments of freight and passengers intrastate and interstate; with every expense of the whole system as to its equipment, maintenance, and operation, extending over all; with every branch constituting a feeder for the most central and remote part, wherever it may be; with the central part likewise a carrier out unto every branch, and all parts carrying some traffic that none other has, the incomes and outlays are inseparable, the existence of all is needed, operated and employed as an entity, and the whole sys-

tem must of necessity be considered together.

Unless there be some special circumstance (sometimes commented upon, as exceptionally valuable terminals in one locality over another,) it all must be averaged, it all must be estimated, as it is operated all together, and the average value of the railroad mile therefrom must and can only be thus ascertained.

How could it be possible to separate the cost of and income from traffic of Colorado, a part of which comes from within, a part comes from beyond, and a part of which is partly within and partly without the confines of the state?

How could it be possible to separate the expense and income upon the carriage of freight, in car-lots or otherwise, carried in the same way?

The cost of equipment, the opportunities for and operating it over the entire system, are such that every part and every branch constitutes an agency of collection, carriage, and distribution from all the sources and branches of industry, commerce, and trade intercepted and served by the network of rails.

The above fact was practically admitted by the witness Scribner; and as a foundation for the claim that some lower value should be ascribed to the mile in Colorado than elsewhere, and to tax the average mile up the approved method would be an importation of value, the plaintiff offered no evidence, palpably because there was none obtainable, except that in the handling of business, gathered from all the quarters, feeding

the system, there were 715.54 miles in the aggregate of second track, where the business was carried over a main and second track, and that it chanced that but 5½ miles of this lay within the confines of Colorado.

It was not contended that this second track was all in a particular place, or that it was more of an essential than the Julesburg, Denver, Cheyenne, or any principal feeding branch, or that it was of other utility than sidings, long and short, established thruout the system; nor was any contention made that the stations or terminals at Cheyenne or other stations in Wyoming, or in Utah, or in Omaha, or elsewhere, were such that the same gave rise to any reason for a difference of valuation of the average mile from that within the state of Colorado. Nor was it asserted, nor does it appear, that the business accruing to the operated mile of railroad along the Julesburg or the Denver-Cheyenne branch, thru this particular county, where the land and property values are so high, according plaintiff's evidence, was not of equal amount and earning power as the average accruals elsewhere thruout the system.

The utter absence of this proof, which, if it existed, would be under the absolute control of these experts whose lives are devoted to such establishment, is most conclusive oftheir non-existence. Mr. Scribner could think of no circumstance to which to attribute a higher value outside of Colorado than within, except the 715.54 miles of second track, and that, therefore, in the carriage of the freight accumulations of

the whole system more rolling-stock would be there employed.

Equity is the ultimate object which is here sought, in order that equality of burden upon equality of value shall be borne, in conformity with the constitutional command. Therefore, the flagrant errors, overestimates of miles, and undervaluation of this road by the Tax Commission of right ought to be considered to the same extent that the alleged errors of other taxing officers are placed under surveillance. And if, in view of all, the properties assessed in 1912 by the several authorities have been assessed at the same, or approximately the same percentage of value, then the assessment should stand. The matter of assessment, taxation, and collection is a legislative and not a judicial function. This court can make no new assessment; the law affords methods for affording relief to those who pay excess tax to the state in all cases where errors are ascertained, and it is the presumption, if any such shall develop or are established, that the law will be obeyed.

The assesment of the Union Pacific was not in conformity with the law of Colorado, which requires that a railway company such as plaintiff file, as a basis for assesment, a schedule setting forth facts from which an assessment may be made, upon an approved method, known as the stocks and bonds method and the capitalization-of-income method, to ascertain the average value of the road per mile. We do not contend

that the state has any right, nor does the statute sanction the taxation of any values of any of the property of the plaintiff lying beyond the jurisdiction. The statute does provide, however, a system for ascertainment of the total number of operated miles of the system which lie within the state, and also the number of those miles which lie within each county thereof; then a schedule of statements from which, under the stocks and bonds and capitalization-of-income methods, also called earnings method, the value of the average mile may be ascertained, and then a command to the taxing authorities that such assessments be made upon the average mile as shall insure the payment in Colorado of taxes upon the values which there exist. This, of course, includes all values; not alone the physical value of the road and ties, the rolling-stock and equipment, but every value in any manner attached. This statute was ignored; the methods perverted; the intent set aside.

XVIII.

COLORADO STATUTE DOES NOT IMPORT VALUES.

The statutes of Colorado which are the basis for such an assessment are in accord and harmony with the decisions of the Supreme Court of the United States, and define a method and are a command to the taxing officers to secure the taxation of those values, without importations, in accord with the provisions

of the Constitution of this state and of the United States.

It is respectfully urged that the statutes are in no manner violate of any principle of the fundamental law of the United States or of the State of Colorado; that they were not followed in the case at bar, and that by their evasion manifest injustice was done to taxpayers of Weld County other than the Union Pacific Railroad Company.

The statutes referred to are as follows:

Section 5642 of the Revised Statutes of Colorado, 1908, which directs the making of a schedule from which the values may be ascertained, reads as follows:

> "5642. The president, vice-president, general superintendent, tax agent, or some other general officer of each railway, company or corporation owning, operating, controlling or having in its possession in this state, any railroad, shall furnish said board and file with its clerk between the first day of March and the first day of April in each year, a statement signed and sworn to by one of such officers, and showing in detail for the year ending on the 31st day of December preceding:
>
> First—The whole number of miles of main track operated or controlled by such corporation, as well that without as that within this state; the whole number of miles of such track within this state which shall include the right of way and all

grounds adjacent thereto, bridges, culverts, pipe lines, fences and snow sheds, owned, operated or controlled in this state by such railway company making the returns, the number of miles in each county, and the value thereof per mile; *Provided, however,* That lines upon which trains are operated regularly shall be considered as a main track and assessed accordingly.

Second—The number of miles of side tracks and the turnouts in each county within this state, and the value thereof per mile.

Third—A detailed description of all real estate used or necessary to be used for the convenient and proper operation of the said road, and not included within nor adjacent to its right of way, and the value thereof; also a detailed description of all real and other property owned or controlled by such company or corporation, and not directly used in the operation of such road, and the value thereof.

Fourth—A detailed statement, giving size, character, value, and location as to county, of all depots, station houses, eating houses, machine shops and other buildings owned or controlled by such railway company, and used or necessary to be used, for the convenient and proper operation of its road, the lands occupied by the same, and the value thereof.

Fifth—A full list of rolling stock belong-

ing to or operated by such railway company, setting forth the number, class and value of all locomotives, snow plows, flangers, wreckers, pile drivers, and steam shovels, passenger cars, dining cars, buffet cars, sleeping cars or other palace cars, express cars, mail cars, box cars, cattle cars, coal cars, platform cars and all other kinds of cars, owned or used by said company.

Sixth—A statement showing the amount and character of all tools, materials, hand cars, push cars, supplies and all other personal property, and the value thereof.

Seventh—The number of miles of telegraph and telephone wire owned or controlled by such company, both within and without this state; the number of miles of such wire, within this state; the value thereof per mile of single wire, and the value of each additional wire per mile.

Eighth—The amount of money and other cash items, the number of shares of the capital stock of said corporation outstanding, the par value thereof, and the average market value thereof, during the year for which the assessment is made, as near as may be; the total amount and market value of mortgage bonds or other incumbrance upon the property of such corporation; and the rate of interest payable thereon; the total gross earnings, also the net earnings of said corpora-

tion during the year for which said statement is made and the total amount expended in the operation and maintenance of the property and the improvement thereof, distinguishing that expended for improvement or betterment from that expended in maintenance or operation, and such further information as the state board of equalization may in writing require."

Section 5653 of the Revised Statutes of Colorado, 1908, requires that from this information the assessment shall be made upon all the values which exist and pertain thereto, by an assessment upon the average value of the railroad mile, as follows:

"In case of railway, telegraph, and telephone companies, whether part or all of the corporate plant or profit producing unit, is situate with in this state, the state board of equalization shall (1) determine the true value of the entire corporate plant wherever situate, and in the manner heretofore set down in this act; and (2) the board shall then ascertain and determine the total number of miles of railway track, telephone or telegraph lines, of said company wherever situate; and (3) the total of such mileage in this state. *This state shall be entitled to that proportion of the total value of any such plant so ascertained for the purposes of assessment and taxation, that the mileage of any such company in this state bears to its total mileage*

wherever situate, and the state board of equalization shall asses the same accordingly." (Italics ours.)

The statute further provides that, when the value of the railroad mile within the state is ascertained, the amount shall be apportioned to those counties wherein the mileage lies, in accordance with the mileage which therein exists; being section 5656, as follows:

"On or before the 15th day of June in each year the state board of equalization shall transmit to the county clerk of each county through which the track of any railway company, * * * may extend, a detailed statement showing the length of the main track of such railway * * * in such county, and the assessed value per mile of the same, as fixed by ratable distribution of the assessed value of the whole property of such corporation, among the different counties of the state, and also the amount of both real and personal property of such railway in the state, and the description of such real and personal property used in each county for the necessary operation of such railway. * * *. Each county shall be entitled for the purposes of taxation, and shall tax, a share and part of the total value of the properties of each railway company, * * * * which shall be to the whole value of the properties of such corporation, as the number of miles of the

railway * * * operated by such corporation within the state bears to the number of miles in such county."

These statutes make it clear that no evasion, such as has been here attempted by the plaintiff under the pretense of *state earnings and expenses*, impossible of ascertainment, shall be tolerated for the purpose of defeating that equity of burden which is the command of the Constitution, requiring uniformity of taxation upon all classes of property within the jurisdiction levying the tax.

From the whole structure it is manifest that it is the intent of the law of this state that the tax officers shall tax the values which exist within the state in a manner that by the Tax Commission, as honestly admitted by Commissioner Link, was not done in 1912, but will be hereafter.

XIX.

STOCK AND BONDS AND CAPITALIZATION OF INCOME METHODS JUDICIALLY APPROVED.

The stock and bond and the capitalization-of-income are methods of taxing railroads as prescribed by the statutes of Colorado.

These methods have been upheld by courts thruout the country and have been especially approved by decisions of the courts of the United States. The taxation of railroad property upon the mileage basis, which must of necessity take

into consideration those intangible values which are said to travel concomitant with every mile, is approved by an abundance of authority from the courts of the United States.

From these we cite:

State Railroad Tax Cases, 92 U. S. 575.
A. T. & S. F. Ry. Co. vs. Sullivan, 173 Fed. 456.

Cleveland etc. Ry. Co. vs. Backus, 154 U. S. 439.

Adams Ex. Co. vs. Ohio, 165 U. S. 194.

The State Railroad Tax Cases,*supra*, arose over an assessment in the State of Illinois. In that case there are set forth at length the provisions of the Constitution of Illinois relative to uniformity of taxation according to values, the statutory provisions, and certain of the rules and regulations of the state board of equalization. For the purpose of this question it is necessary only to consider that the assessment of railroads under the law of Illinois at the time of the decision was by means of an assessment upon the capital stock and the rolling-stock, on the mileage basis. Section 45 of the Illinois act concerning property assesments, appearing at page 581 of the report reads:

> "The rolling-stock shall be listed and taxed in the several counties, towns, villages, districts, and cities, in the proportion that the length of the main track, used or operated in such county, town, village, district, or city, bears to the whole length of the road used or

> operated by such person, company, or corporation, whether owned or leased by him or them, in whole or in part. Said list or schedule shall set forth the number of miles of main track on which said rolling-stock is used in the state of Illinois and the number of miles of main track on which said rolling-stock is used elsewhere."

It is necessary only to observe, further, that the apportionment of these values on the mileage basis was required to be made to the counties, townships, cities, and villages, in the same manner that it is apportioned in Colorado.

This case has become leading authority on this subject, as well as upon that of jurisdiction in equity to interfere with the taxing power, and announces fully in the opinion the doctrine we have urged here against equitable interference with taxing powers, except where there is no remedy at law that is adequate.

On the subject of taxation upon the mileage basis, among other things, Mr. Justice Miller, in his opinion at pages 601 *et seq.*, says:

> "The act of the legislature of Illinois of March 30, 1872, under which the taxes complained of were assessed, makes special provisions for the taxation of railroad and other corporations, the main feature of which is the purpose of leaving to each county, city, and town, the power of assessing for taxation

what is properly local in the same manner that other similar property is taxed in that municipality, and at the same time to subject to like taxation on some fair basis that which is not in its nature so clearly local, but which, by reason of its being appurtenant, or incident to the railroad, should pay its share to the state, and to all the counties, towns, and cities through which any part of the road runs. The theory of the system is manifestly to treat the railroad track, its rolling-stock, its franchise, and its capital as a unit for taxation, and to distribute the assessed value of this unit according to the length of the road in each county, city, and town bears to the whole length of the road. * * *

It is obvious, however, that while a fair assessment under these two descriptions of property will include all the visible or tangible property of the corporation, it may or may not include all its wealth. There may be other property of a class not visible or tangible which ought to respond to taxation, and which the state has a right to subject to taxation. Thus it may occur, as in fact is claimed by one of these companies, that, being insolvent, and its earnings not being sufficient to pay anything beyond its necessary expenses for operating the road and its repairs, this tangible property represents more than the real wealth of the company and its property.

While, on the other hand, another one of these companies is so rich that, after paying its expenses and interest on a large amount of debt, it declares large dividends; and this interest and these dividends, when looked to in reference to what is called the tangible property, show that there is here another element of wealth which ought to pay its share of the taxes.

3. This element the state of Illinois calls the value of the franchise and capital stock of the corporation,—the value of the right to use this tangible property in a special manner for purposes of gain. This constitutes the third valuation, which is likewise to be made by the board of equalization; and, when thus ascertained, is subjected to the taxation of the state, counties, towns, and cities, by the same rule that the value of the roadbed is; namely, according to the length of the track in each taxing locality. The words 'Capital stock' as here used do not mean the shares of the stock, but the aggregate capital of the company. * * *

The statute of Illinois, and the rule adopted by the board of equalization, under the power conferred by the clause we have just recited, may not be the wisest mode of doing complete justice in this difficult matter; but we confess we have, on the whole, seen no scheme which is better adapted to effect

the purpose, so far as railroad corporations are concerned, of taxing at once all their property, and of making the tax just and equal in its relation to other taxable property of the state.

It may be assumed for all practical purposes, and it is perhaps absolutely true, that every railroad company in Illinois has a bonded indebtedness secured by one or more mortgages. The parties who deal in such bonds are generally keen and far sighted men and most careful in their investments. Hence the value which these securities hold in the market is one of the truest *citeria*, as far as it goes, of the value of the road as a security for the payment of these bonds.

These mortgages are, however, liens on the road, and, taking precedence of the shares of the stockholders, may or may not extinguish the value of his shares. They must in any event affect that value to the exact amount of the aggregate debts. For all that goes to pay that debt and its interest diminishes *pro tanto the* dividend of a shareholder and the value of his share.

It is therefore obvious, that when you have ascertained the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its

franchise; for these are all represented by the value of its bonded debt and of the shares of its capital stock. * * *

It is further objected that the railroad track, capital stock, and franchise is not assessed in each county where it lies according to its value there, but according to an aggregate value of the whole, on which each county, city, and town collects taxes acording to the length of the track within its limits.

This, it is said, works injustice both to the counties and to the companies. To the counties and cities, by depriving them of the benefit of this value as a basis of local taxation; to the company, by subjecting its track and franchises on the basis ofthis general value, to the taxation of the counties and towns, varying, as they do, in rate, without the benefit of the rule of assessment which prevails in those counties in the valuation of other and similar property. But, as we have already said, a railroad must be regarded for many, inded for most purposes, as a unit. The track of the road is but one track from one end of it to the other, and, except in its use as one track, is of little value. In this track as a whole each county thru which it passes has an interest much more important than it has in the limited part of it lying within its boundary. Destroy by any means a few miles of this track within an interior

county, so as to cut off the connection between the two parts thus separated, and, if it could not be repaired or replaced, its effect upon the value of the remainder of the road is out of all proportion to the mere local value of the part of it destroyed. A similar effect on the value of the interior of the road would follow the destruction of that end of the road lying in Chicago, or some other place where its largest traffic centers. It may well be doubted whether any better mode of determining the value of that portion of the track within any one county has been devised than to ascertain the value of the whole road, and apportion the value within the county by its relative length to the whole."

From this case it is clear that the attitude of the Supreme Court of the United States on this question is an absolute approval of the valuation of a profit-producing unit, such as a railroad, as an entirety, and thereafter a division thereof, such as is required by the Colorado law, upon the mileage basis.

In the case of Cleveland etc. Co. vs. Backus, *supra*, the court in its opinion at page 443, on a subject like that in the State Railroad Cases, said:

"The inquiry therefore in view of the testimony received and that offered and rejected is narrowed to these two matters: First. If an assessing board, asking to assess for purposes of taxation a part of a road within a state, the other part of which is in an adjoin-

ing state, ascertains the value of the whole line as a single property and then determines the value of that within the state, upon the mileage basis, is that a valuation of property outside of the state, and must the assessing board, in order to keep within the limits of state jurisdiction, treat the part of the road within the state as an independent line, disconnected from the part without, and place upon that property only the value which can be given to it if operated separately from the balance of the road? Second. Where an assessing board is charged with the duty of valuing a certain number of miles of railroad within a state forming part of a line of road running into another state, and assesses those miles of road at their actual cash value determined on a mileage basis, is this placing a burden upon interests commerce, beyond the power of the state, simply because the value of that railroad as a whole is created partly —and perhaps largely—by the interstate commerce which it is doing?

With regard to the first question it is assumed that no special circumstances exist to distinguish between the condition in the two states, such as terminal facilities of enormous value in one and not in another. With this assumption the first question must be answered in the negative. The true value of a line of railroad is something more than an aggrega-

tion of the values of separate parts of it operating separately. It is the aggregate of those values plus that arising from a connected operation of the whole, and each part of the road contributes not merely the value arising from its independent operation, but its mileage proportion of that flowing from a continuous and connected operation of the whole. This is no denial of the mathematical proposition that the whole is equal to the sum of all its parts, because there is a value created by and resulting from the combined operation of all its parts as one continuous line. This is something which does not exist, and cannot exist, until the combination is formed. A notable illustration of this was in the New York Central Railroad consolidation. Many years ago the distance between Albany and Buffalo was accupied by three or four companies, each operating its own line of road, and together connecting the two cities. The several companies were united and formed the New York Railroad Company, which became the owner of the entire line between Albany and Buffalo, and operated it as a single road. Immediately upon the consolidation of these companies, and the operation of the property as a single, connected line of railroad between Albany and Buffalo, the value of the property was recognized in the market as largely in excess of the aggregate of the values of the separate prop-

erties. It is unnecessary to enter into any inquiry as to the causes of this. It is enough to notice the fact, now, when a road runs into two states each state is entitled to consider as within its territorial jurisdiction and subject to the burdens of its taxes what may perhaps not inaccurately be described as the proportionate share of the value flowing from the operation of the entire mileage as a single contiuous road. It is not bound to enter upon a disintegration of values and attempt to extract from the total value of the entire property that which would exist if the miles of road within the state were operated separately. Take the case of a railroad running from Columbus, Ohio, to Indianapolis, Indiana. Whatever of value there may be resulting from the continuous operation of that road is partly attributabe to the portion of the road in Indiana and partly to that in Ohio, and each state has an equal right to reach after a just proportion of that value, and subject it to its taxing processes. The question is, how can equity be secured between the states and to that a division of the value of the entire property upon the mileage basis is the legitimate answer. *Taking a mileage share of that in Indiana is not taxing property outside of the state.*

The second question must also be answered in the negative. It has been again and again said by this court that while no state

could impose any tax or burden upon the privilege of doing the business of interstate commerce, yet it had the unquestioned right to place a property tax on the instrumentalities engaged in such commerce. See among other cases Marye v. Baltimore and Ohio Railroad, 127 U. S. 117; Pullman's Palace Car Company v. Pennsylvania, 141 U. S. 18.

The rule of property taxation is that the value of the property is the basis of taxation. It does not mean a tax upon the earnings which the property make nor for the privilege of using the property, but rests solely upon the value. But the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the vaule, and if the property is taxed at its actual cash value it is taxed upon something which is created by the use to which it is put. In the nature of things it is practically impossible—at least in respect to railroad property—to divide its value and determine how much is caused by one use to which it is put and how much by another. Take the case before; *it is impossible to disintegrate the value of that portion of the road within Indiana and determine how much of*

that value springs from its use in doing business wholly within the state. An attempt to do so would be entering upon a mere field of uncertainty and speculation." (Italics ours.)

Thus it is clear there is not only no importation of value by following the mileage method but there is no importation of values.

In Adams Express Co. vs. Ohio, *supra*, on the subject of assessment of express companies on the mileage basis, where the same were doing interstate business, in the opinion of Chief Justice Fuller, at p. 220 of the report, the court says:

> "As to railroad, telegraph and sleping car companies, engaged in interstate commerce, it has often been held by this court that their property, in the several states through which their lines or business extended, might be valued as a unit for the purpose of taxation, taking into consideration the uses to which it was put and all the elements making up the aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any federal restriction. Western Union Telegraph Co. v. Massachusetts, 125, U. S. 530; Massachusetts v. Western Union Telegraph Co., 141 U. S. 40; Maine v. Grand Trunk Railway, 141 U. S. 217; Pittsburg, Cincinnati, &c Railway v. Backus, 154 U. S. 421; Cleveland, Cincinnati, &c. Railway v. Backus, 154 U. S. 439; Western Union Tele-

graph Co. v. Taggart, 163 U. S. 1; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18. The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company, or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on , a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state, is in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole, Pittsburgh &c. Railway v. Backus, 154 U. S. 421; or taking as the basis of assessment such proportion of the capital stock of a sleeping car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states, Pullman's Palace Car Company v. Pennsylvania, 141 U. S. 18; or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of all its lines everywhere, de-

ducting a sum equal to the value of its real estate and machinetry subject to local taxation within the state, Western Un. Tel. Co. v. Taggart, 163 U. S. 1.

Doubtless there is a distinction between the property of railroad and telegraph companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose and there are the same elemnets of value arising from such use.

The cars of the Pullman Company did not constitute a physical unity, and their value as separate cars did not bear a direct relation to the valuation which was sustained in that case. The cars were moved by railway carriers under contract, and the taxation of the corporation in Pennsylvania was sustained on the theory that the whole property of the company might be regarded as a unit plant, with a unit value, a proportionate part of which value might be reached by the state authorities on the basis indicated.

No more reason is perceived for limiting the valuation of the property of express companies to horses, wagons and furniture, than that of railroad, telegraph and sleeping car companies, to roadbed, rails and ties; poles and wires; or cars. The unit is a unit of use and management, and the horses, wag-

ons, safes, couches and furniture; the contracts for transportation facilities; the capital necessary to carry on the business, whether represented in tangible or intagible property in Ohio possessed a value in combination and from use in connection with the property and capital elsewhere, which could as rightfully be recognized in the assessment for taxation in the instance of these companies as the others.

We repeat that while the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unit of use, not simply for the convenience or pecuniary profit of the owner but existing in the very necessities of the case—resulting from the very nature of the business. * * *

Considered as distinct subjects of taxation, a horse is, indeed, a horse; a wagon, a wagon; a safe, a safe; a pouch, a pouch; but how is it, that $23,430 worth of horses, wagons, safes and pouchees produce 275,446 in a single year? Or $28,438 worth, $358,519? The answer is obvious. * * *

And this provision was thus construed by the supreme court of Ohio in State v. Jones: 'The board, in determining the value of the company's property in this state for taxation, is not required to fix the value of such property upon the principle that the

value of the entire property of the shall be deemed the same as the value of its entire cauital stock, thus making the respective values equivalents of each other. But taking the market value of the entire capital stock as a datum, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this state. The statute does not bind the board to find the value of the entire property of the company equal to that of the entire capital stock.'

The court further said: 'But the property of the corporation may be regarded in the aggregate, as a unit, an entirety, as a plant, designed for a specific object; and its value may be estimated not in parts, but taken as a whole. If the market value—perhaps the closest approximation to the true value in money—of the corporate property as a whole, were inquired into, the market value of the capital stock would become a controlling factor in fixing the value of the property. Should all the stockholders unite to sell the corporate plant as an entirety, they would not be inclined to sell it for less than the market value of the aggregate shares of the capital stock. Besides, while the amount of the capital stock may be limited by the charter and the laws governing it, the real and personal property of the corporation may be constantly augmented and may

keep pace with any increase in the value of the capital stock. The market value of the capital stock, it is urged, has no necessary relation to the value of the tangible property of the corporation. But such is the well understood relation between the two that not only is the value of the capital stock an essential factor in fixing the market value of the corporate plant, but the corporate capital or property has a reflex action on the value of the capital stock. * * *

Neither does the fact that the property of express companies was valued as a unit profit producing plant violate any federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property deuends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land, plus so many tons of rails and so many thousnad ties and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the state of Ohio had a right to tax the property within the state, and to assess it at its true cash value, there is no federel restriction which will prevent such property from being 'assessed at the value which it has, as used, and by reason of its use.' * * *

That an express company owns no line of railway and operates no railroad does not prevent the value of its property from being affected by the relation of each part to every other part and the use to which a part is put as a factor in a unit business.

* * *

Nor, in this view, is the assessment on property not within the jurisdiction of the taxing authorities of the state and for that reason amounting to a taking of property without due process of law. The property tax has its actual situs in the state and is, therefore, subject to the jurisdiction, and the distribution among the several counties is a matter of regulation by the state legislature. Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22; State Railroad Tax Cases, 92 U. S. 575; Deleware Railroad Tax, 18 Wall. 206; Erie Railroad v. Pennsylvania, 21 Wall. 492; Columbus Southern Railway v. Wright, 151 U. S. 470.

In Pullman's Palace Car Co. v. Pennsylvania, the rule is considered that personal property may be separated from its owner and he may be taxed, on its account, at the place where it is, although not the place of his own domicile, and even if he is not a citizen or a resident of the state which imposes the tax; and the distinction between ships and vessels and other personal property is pointed

out. The authorities are largely examined and need not be gone over again.

There is here no attempt to tax property having a situs outside of the state, but only to place a just value on that within. Presumptively all the property of the corporation or company is held and is used for the purposes of its business, and the value of its capital stock and bonds is the value of only that property so held and used.

Special circumstances might exist, as indicated in Pittsburgh, Cincinnati, &c. Railway v. Backus, 154 U. S. 421, 443, which would require the value of a portion of the property of an express company to be deducted from the value of its plant as expressed by the sum total of its stock and bonds before any valuation by mileage could be properly arrived at, but the difficulty in the case at bar is that there is no showing of any such separate and distinct property which should be deducted, and its existence is not to be assumed. It is for the companies to present any special circumstances which may exist, and, failing their doing so, the presumption is that all their property is directly devoted to their business, which being so, a fair distribution of its aggregate value would be upon the mileage basis."

These rulings of the Supreme Court upon this matter were clearly followed in Atchison, Topeka &

Santa Fe Co. vs. Sullivan, *supra*, wherein, at pages 462 *et seq.*, Judge Sanborn says:

> "Statutes of Colorado require the board of equalization to assess the property in that state of a railroad company held for railroad purposes, excluding its property not necessary or convenient for those purposes which was otherwise assessed, on the basis of the unit of use, to determine the true value unit, whether a part or all of it was situated in that state, to ascertain the total number of miles of its railroad rack wherever situated, the total number of miles in the state and in each county of the state and then, after giving due consideration to the relative values of different portions of the corporate plant and of the franchises appurtenant thereto, and all other competent evidence and just considerations relatives to the value of the plant and its various parts, to ascertain the value of the part of the corporate plant in Colorado and in each county in that state in the light of all these considerations and all this evidence upon the theory that in the absence of countervailing considerations or evidence, the value of that part of the company's profit-producing unit in the state would be that portion of the value of its entire corporate plant which the number of miles of its railroad in the state bore to its entire mileage and that the value of that part

of its railroad property in each county would be that proportion of the value of its corporate plant in the state that its number of miles in the county bore to its number of miles in the state. Sections 3918 and 3920. This method of assessment has been repeatedly sustained by the supreme court. Pittsburg, C. C. & St. L. R. R. Co. v. Backus, 154 U. S. 421, 428, 429, 430, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Adams Ex. Co. v. Ohio State Auditor, 165 U. S. 194, 197, 221, 17 Sup. Ct. 305, 41 L. Ed. 683. * * *

* * * But the entire 8,119.04 miles were reported by the complaintant to be owned by it and they were operated by it and were a part of its profit-producing plant, which the state lawfully makes the basis of valuation although there may have been other railroad companies than the complainant which were owned or controlled by it and were engaged in the operation.

They complain because the market value of the stock and bonds includes the value of the franchises of the company and of its right to conduct interstate commerce. The right to carry on interstate commerce is exercised by the company within as well as without the state of Colorado, and is appurtenant to each mile of its railroad wherever situated, and the tax levy upon the assessment made upon

the mileage basis is not a tax upon interstate commerce; but it is a tax upon the property of the company in the state. Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 697, 698, 15 Sup. Ct. 268, 360, 39, L. Ed. 311; Adams Express Co. v. Ohio State Auditor, 165 U. S. 195, 220, 226, 17 Sup. Ct. 305, 41 L. Ed. 683. It is true that the current cash value of the whole funded debt and of the entire stock of a railroad company shows what, in the opinion of those who own and deal in its securities and who are perhaps best able to judge, the value of all the property of the company is, and that this value includes all the tangible and all the intangible property of the company, all its corporate franchises, all its privileges and contracts, and all its good will. State Railroad Tax Cases, 92 U. S. 575, 605, 23 L. Ed. 663; Pittsburg, Cincinnati, Chicago & St. Louis R. Co. v. Backus, 154 U. S. 421, 429, 14 Sup. Ct. 1114, 38 L. Ed. 1031; Adams Express Co. v. Ohio State Auditor, 166 U. S. 185, 221, 222, 17 Sup. Ct. 604, 41 L. Ed. 965. But all the tangible property convenient for railroad purposes, the roadbed, the rails, the ties, the station houses, is combined unavoidably and inextricably with the intangible property, with the franchises, privileges, and contracts of the corporation into a single corporate plant, a single profit-producing unit used for rail-

road purposes. This intangible property unavoidably and automatically distributes itself wherever the tangible property is, and it enhances the value of every part of it. There are 26 miles of the complainant's railroad in Bent county. There is uncontradicted evidence that this part of the railroad, excluding rolling stock and shop machinery, could be reproduced for from $20,000 to $21,000 per mile; but this part of the complainant's railroad, separate from the system or from the operating unit of which it is a component portion, would be worth far less than it now is, because the franchise of the complainant to be, its franchise to do, its privileges to carry on, interstate commerce, all its franchises and privileges and its good will, are appurtenant to this portion of its railroad, are exercised to operate it, and become a part of its value. Adams Express Company v. Ohio State Auditor, 166 U. S. 185, 221, 222, 223, 224, 17 Sup. Ct. 604, 41 L. Ed. 965.

Counsel for the company insist that the current cash value of the stock and bonds is an erroneous and misleading fact from which to deduce the value of the company's railroad property in Colorado, because the portions of its railroad in some more populous states are of greater value per mile than the part of its railroad in Colorado. It is undoutedly a fact that there must be this differ-

ence in value of the separate parts of the railroad. But this difference in value exists in the case of every other corporation which has been or is assessed upon the mileage basis according to the rule of the unit of use, and notwithstanding this fact that rule probably presents the best, and it certainly presents a lawful method of ascertaining the value of such property for assessment, when the board or court which is finding the value gives due consideration and effect to considerations and evidence relative to the value of the entire corporate plant, relative to the value of that part of the company's property not included within the plant which must be deducted from the value of its entire property, and to considerations and evidence relative to the value of different parts of the corporate plant and of the franchises appurtenant thereto; and in view of this fact the market value of the stock and bonds must be competent and persuasive evidence from which to ascertain the value of the railroad in the state of Colorado or in any other state.

Counsel contend that the market value of the stock and bonds is a misleading fact from which to deduce the value of the railroad property in Colorado, because the complainant has other property than that used for railroad purposes, the value of which should be deducted from the market value of the

stock and bonds and because the company has more valuable terminals at Chicago, Kansas City, Galveston, Los Angeles, and San Francisco, than it has in the state of Colorado, but there is no competent evidence in the record of the amount and value of the property which the complainant owned in the year 1904 that was not a part of the profit-producing unit, nor of the value of complainant's terminals outside of Colorado or within that state.

The company was called upon in accordance with the statute to make a return of its corporate plant as a basis for the assessment of its property. It made that return, and it has been introduced in evidence in this case. The presumption is, in the absence of evidence to the contrary, that a railroad company holds all its property for railroad uses, and that the value of the stock and bonds stated in the return indicates the value of the complainant's property held for those purposes. If it had accumulated property that it was not using or holding for such purposes, or if its case was one of those exceptional cases wherein some parts of its railroad in other states were of extraordinary value, it would have been competent for it to have proved that fact at the hearing below. In the absence of any such proof, the legal presumption must prevail, and the market

value of its stock and bonds, divided by the number of miles of its railroad, must be substantial evidence of the value of its railroad per mile in the state of Colorado and in the county of Bent. Adams Express Co. v. Ohio State Auditor, 165 U. S. 194, 227, 17 Sup. Ct. 305, 41 L. Ed. 683; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 222, 223, 17 Sup. Ct. 604, 41 L. Ed. 965; Pittsburg, Cincinnati, Chicago & St. Louis R. Co. v. Buckus, 154 U. S. 421, 430, 14 Supt. Ct. 1114, 38 L. Ed. 1031.

The result is that this record contains the evidence of two witnesses that the cost of reproduction of that part of complaintant's railroad in Colorado in 1904, exclusive of rolling stock and shop machinery, would have been about $20,000 per mile on the one hand, and on the other hand evidence of the gross earnings and of the net earnings of the entire corporate plant of the company for the year ending June 30, 1904, and of the current cash value of the obligations evidencing the funded debt, and of the stock of the company during that year, to the effect that the value of the complainant's corporate plant or profit-producing unit; and hence, under the statutory and legal rule for its assessment for taxation on a mileage basis, the value of that part of its plant in Colorado was about $52,663.92 per mile. The assessment made by the board

$24,500 per mile was 28% of this value. The gross and net earnings and the current cash value of the obligations which evidenced the funded det and of the stocks of a railroad company are neither exclusive nor conclusive evidence of the value of its railroad property, or of the part of its profit-producing unit in any state. But they are competent and more persuasive evidence of such value than the mere cost of reproducing the tangible property which constitutes the railroad, or any part of it, because this cost of reproduction excludes the value of the intangible property of the company, of its good will, its franchise, its privileges, and its contracts, which is sometimes greater than the value of its property (Adams Express Company v. Ohio State Auditor, 165 U. S. 194, 220, 221, 223, 224, 17 Sup. Ct. 305, 41 L. Ed. 683), and because those who actually buy, sell, and own the stocks and bonds of a railroad company are generally better qualified than strangers to form correct opinions of the value of its property, and the current market value of all these securities is very persuasive proof of their estimate of the value of the property of the company (State Railroad Tax Cases, 92 U. S. 575, 605, 23 L. Ed. 663; Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031).

When to these facts are added the presumptions that in the absence of countervailing evidence, all the property of a railroad company is held by it for railroad uses, and that the value of one part of it may be fairly estimated by taking that part of the value of its corporate plant which is measured by the proportion of the length of the particular part to that of the whole railroad (Adams Ex. Co. v. Ohio St. Auditor, 166 U. S. 185, 223, 17 Sup Ct. 604, 41 L. Ed. 965; State Railroad Tax Cases, 92 U. S. 575, 611, 23 L. Ed. 663; Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Backus, 154 U. S. 421, 430, 14 Sup. Ct. 1114, 38 L. Ed. 1031), and the fact that the gross and net earnings of the corporate plant for a considerable time preceding the date of the valuation were ample, after paying expenses of maintenance, operation, and reasonable betterments, to pay reasonable interest on the current cash value of all the outstanding stock and of all the bonds and other oligations of the company, this evidence becomes too persuasive to be overcome by the testimony of the mere cost of reproducing the tangible structure consisting of right of way, roadbed, ties, rails, station houses, and other improvements which form a part of the railroad."

From these opinions it is clear that the best and most approved method for ascertainment of the value

of railroad property is to determine the value of the entire plant, or profit-producing unit, either by the capitalization of its earnings or the stock and bond method, and, in the absence of countervailing evidence, to determine the average value per mile by division of the aggregate by the number of actively operated miles constituting the plant or profit-producing unit.

It is also clear from these authorities that the statute of Colorado requires the taxation of these railroad values in accordance with these long established and judicially approved methods, not for importation or taxation of values outside its jurisdiction, but to insure in the support of the state government—protecting all values—a taxation burden upon all property, equitable and uniform, in accord with the provisions of the Constitution of Colorado and of the Federal government demanding equal protection of the laws.

In the case at bar the plaintiff offered no evidence whatever that it had in states other than Colorado any terminals, station-houses, or equipment, not a part of the plant or profit-producing unit, or even part thereof, of any such variation in value from those in Colorado as to require any deviation from the rule upon this question. The only evidence attempted in this line was that at some points along the road, principally out of Colorado, there were in use in the aggregate 754.51 miles of second track. This we earnestly maintain, was not a sufficient circumstance to justify any such flagrant and wanton disregard of the duty placed upon the Colorado Tax Commission as was indulged in the

assessment of this property. There was no evidence introduced in the nature of the situation that would convince any fair mind that the earnings in Colorado could be or were shown to be limited to any such amount as was pretended in the schedule. In fact, no matter what may be there or elsewhere asserted, in the very nature of the situation, whatever the auditor of the road may say, the Union Pacific System is a single entity, a profit-producing unit,and in 1911 consisted of 6,678.29 operated miles, the portion of which in Colorado in 1912 was like unto any mileage of the system elsewhere.

We insist that in the assessment of this property in 1912 the statute was evaded and avoided, its spirit ignored, and its intent perverted. The result was that the property of the Union Pacific in Weld County was assessed in 1912 at not to exceed 20 per cent of its actual value.

This was apparent to the court which heard all the evidence and denied the writ.

The exercise of a sound discretion by the court in this matter is not to be disturbed; the decision is right and should be sustained.

It has been urged by counsel that if plaintiff produced evidence sufficient to make it seem probable that at some other hearing it would or could offer competent evidence, possibly in sufficient amount to establish a case, the court abused its discretion in denying the writ, and that the decision should be reversed.

We confidently deny the correctness of any such

contention, altho we at the same time contend that it is clear, even if this were the gauge, which it is *not;* that the court correctly exercised its judgment and discretion in refusing the writ; for there was and is in this regard such an absolute lack of evidence as to make it clear upon any rule plaintiff may conjure that the judgment of the trial court should be sustained.

The case of Allison vs. Corson, 88 Fed. 581, 584, cited by counsel as supporting the supposed legal principle that all that is required to sustain an application for temporary injunction interfering with the taxing power of a state is simply showing enough of evidence from which a court might conclude that possibly something substantial would be produced, is not a case on matters of taxation, and there the case was absolutely dissimilar from that here at issue. In that case no harm whatever could come from the allowance of the injunction. This is not true in a case in interference with the discharge of governmental duties for which public revenues are employed.

In the case of Allison vs. Corson, *supra*, an injunction was prayed to restrain the holder of a tax certificate from having a tax deed issued thereon prior to the termination of a case then pending for the foreclosure of a certain mortgage, wherein it was claimed that the tax certificate was illegal and void. No injury could result to the defendant in case the temporary injunction was issued, for the reason that it would simply delay the time of the issuance of the deed.

In the case of St. Paul etc. Ry. Co. vs. Northern Pac., 49 Fed., 306, cited by counsel as authority for the above rule, the injunction was simply to restrain a certain commissioner, appointed to sell lands, from delivering certain moneys in his hands until the right to the fund should be determined.

In the case of City of Newton, vs. Lewis, 79 Fed., 715, 718, also cited by counsel, the city of Newton had declared void a certain franchise under which defendant was operating, and threatened to cause the system of poles and wires of defendant to be removed from the streets. In this case no harm could come from the granting of the injunction until the rights were determined.

The case of D. & R. G. Co. vs. U. S., 124 Fed., 156, also cited by counsel, was a case where the dispute was over the taking of certain timber from the public domain under a claimed grant. Under certain modifications, the appellate court reversed the order denying the injunction.

The remaining cases cited by counsel for plaintiff as supporting such liberal rule were of similar character and import.

Clearly this class of cases has no bearing upon the rules concerning the allowance or disallowance of injunction sought to restrain the collection of taxes.

XX.

DECISION MUST STAND UNLESS DISCRETION MANIFESTLY ABUSED.

More strict rule obtains where an injunction is sought to interfere with state government in the matter of tax collection than in other cases.

There is an abundance of authority to the effect that, where a trial court on an application for an injunction has heard the evidence and considered the law pertinent thereto, and, in the exercise of a sound discretion, has denied the application upon the law and the facts, the judgment should not be overturned for light or transient reasons.

To this we cite the following authorities:

Vol. 3, Cyc., 329.

Thompson vs. Nelson et al., 71 Fed., 339.

New York Asbestos Mfg. Co. vs. Ambler Co,. 102 Fed., 890.

Kryptok Co. vs. Stead-Lens Co., 190 Fed., 767.

Acme Acetylene Co. vs. Commercial Acetylene Co., 192 Fed., 321.

Texas Trac Co. vs. Barron G. Collier, 195 Fed., 65.

City of Grand Rapids vs. Warren Bread Co., 196 Fed., 89.

From the abundance of judicial authority estab-

lishing this well-known principle, as shown by the decisions of the appellate courts of the different states supporting the text of 3 Cyc., we deem it unnecessary to burden this brief with other than a few quotations from the decisions of the federal courts manifesting that, if the decision of the trial court was not a manifest abuse of the sound discretion on the law or fact, or upon the law and facts, of the case, the judgment should not be disturbed.

In Kryptok Co. vs. Stead Lens Co., *supra*, Sanborn, J., at page 769 o fthe report, says:

> "The grant of a preliminary injunction rests in the discretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence; and where the court has not departed from them its injunctional orders may not be reversed without clear proof of an abuse of its discretion."

In Acme Acetylene A. Co. vs. Commercial Acetylene Co., *supra*, Warrington, J., after stating the facts, opens the opinion with the following language:

> "In testing the validity of an order granting a preliminary injunction, we are bound to recognize that there resided in the court making the order a reasonable discretion either to grant or to withold it. And the general rule is that unless it explicitly appears that the court has proceeded upon an erroneous

hypothesis of pertinent fact or law, or has improvidently exercised its legal discretion, the order will not be disturbed. This court has so frequently expressed the rule in this behalf that we need not do more than to cite one or two of the recent decisions, in which reference will be found to the earlier cases. Interurban Ry. & T. Co. v. Westinghouse E. & Mfg. Co., 186 Fed. 166, 170, 108 C. C. A. 298; City of Shelbyville, Ky., v. Grover, 184 Fed. 234, 238, 106 C. C. A. 376."

In Texas Traction Co. vs. Collier, *supra*, Shelby, J., in his opinion says:

"This is an appeal from an order granting an injunction pendente lite. Formerly, the granting of such order was in the absolute discretion of the primary court; no appeal being allowed. The Act of March 3, 1891, allows an appeal from such decree. 26 Stat. 826. Since this act was passed, its uniform construction has been that the granting of an injunction pending the suit is in the sound discretion of the trial court, and that its order will not be disturbed on appeal unless it is violative of the rules of equity, or unless there has been an abuse of discretion, or unless the injunction has been improvidently allowed. The appellate court is not to decide as to what it would have done as to allowing the injunction, but it must recognize that the law has imposed on the primary

court the responsibility of the exercise of this power, and unless there has been a plain disregard of the law or of some settled rule of equity which should govern the issuance of injunctions so that it appears clearly that the injunction is issued improvidently, the decree should not be reversed. Kerr v. City of New Orleans, 126 Fed, 920, 924, 61 C. C. A. 450; Lehman v. Graham, 135 Fed. 39, 67, C. C. A. 513; Massie v. Buck, 128 Fed. 27, 62 C. C. A. 535; Clark v. McGhee, 87 Fed. 789, 31 C. C. A. 321; Love. v. Atchison, T. & S. F. Ry. Co., 185 Fed. 321, 107 C. C. A. 403."

In New York Asbestos Mfg. Co. vs. Ambler Asbestos Co., *supra*, Gray, J., at page 891 of the report, says:

"The motion for preliminary injunction was made upon the pleadings, the bill of complaint, answer, and replication, and upon the affidavits and exhibits submitted with the moving papers; and it is the appeal from the refusal of the court below to grant a preliminary injunction that is now before this court.

The granting of a preliminary injunction is an exercise of a very far reaching power, never to be indulged in except in a case clearly demanding it; and the decision of a court of first instance, refusing such an injunction, will not, except for very strong reasons, be reversed by this court."

From these decisions it is apparent that the rule is that the sound discretion of the trial court in granting or refusing to grant a preliminary injunction is not to be overturned for light and transient reasons. The trial court hears the evidence, and considers the law pertinent thereto. In many ways it has better opportunity to judge than has the court of review. If it be not manifest that the discretion has been abused, the decision is not to be overturned.

It is asserted with confidence that, in view of the law and evidence pertinent to the application in the case at bar, the refusal of Judge Lewis to grant the temporary writ was the exercise of a sound discretion, and rests upon sound premise as to the law and facts of this case.

The trial court heard all the evidence, saw the witnesses, fully understood the issues, heard the arguments as to both law and fact, and clearly, without error, denied the writ, because there was no sufficient equity shown.

The hearing on the application for temporary injunction was upon all the pleadings, all the evidence and all the law, and the judgment and order of the court denying the writ was a determination upon those pleadings, that evidence and law that the injunction should be denied. It amounted to a judicial determination that upon all the averments made in the bill and the evidence offered in support of it, in view of the denials to the answer and the evidence before the court in support thereof, that the plaintiff was not entitled

to the demanded relief because the showing made was insufficient to call for the interposition of equity, because of the existence of the Colorado statute which in all cases such as by this evidence portrayed there was an adequate, speedy and full remedy under the provisions of the Colorado statutes sufficient to afford relief.

We confidently maintain that had this application been made before a Colorado Court the decision would have been the same as that made by Judge Lewis, and that his decision, as well as that of the Circuit Court of Appeals is in full harmony with the long line of decisions of the courts of Colorado and the courts of the United States in all similar instances, and upon similar facts, and that therefore the decision of the Circuit Court of Appeals affirming the order of the trial court was final and should not be disturbed upon review under certiorari, or otherwise.

Respectfully submitted,

CHARLES F. TEW.
Solicitor for Appellees.

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(24,670)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 22

UNION PACIFIC RAILROAD COMPANY, APPELLANT AND PETITIONER,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO; W. R. PATTERSON, AS COUNTY TREASURER OF SAID COUNTY, AND S. J. McAFEE, AS SHERIFF OF SAID COUNTY, APPELLEES AND RESPONDENTS.

APPEAL FROM AND PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR APPELLANT AND PETITIONER.

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C. C. DORSEY,
Solicitors for Appellant and Petitioner.

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(24,670)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 108.

UNION PACIFIC RAILROAD COMPANY, APPELLANT AND PETITIONER,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO; W. R. PATTERSON, AS COUNTY TREASURER OF SAID COUNTY, AND S. J. McAFEE, AS SHERIFF OF SAID COUNTY, APPELLEES AND RESPONDENTS.

APPEAL FROM AND PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR APPELLANT AND PETITIONER.

I.

APPELLATE JURISDICTION (Appellees' Brief, Pages 3-14).

The case is now pending upon appeal. No motion to dismiss the appeal has been made. We are confident of its

propriety. Nevertheless, we have prepared, and herewith present for the convenience of the court, a memorandum relating to its appellate jurisdiction of this cause.

1. *Jurisdiction on Appeal.*

Section 241 of the Judicial Code provides, "in any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

Section 128 of the Judicial Code provides that, "except as provided in sections two hundred and thirty-nine (relating to certification of questions) and two hundred and forty (relating to certiorari) the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws and under the criminal laws, and in admiralty cases."

United States Fidelity & Guaranty Co. *vs.* Bray, 225 U. S., 205, 206, 213, 214, 215, is relied upon as conclusively establishing our right of appeal to the Supreme Court.

By the bill of complaint in this cause Federal jurisdiction was invoked not only on the ground of diversity of citizenship (printed Rec., p. 2), but also upon the ground that, by reason of the invalidity of the assessment, the lack of uniformity in taxation resulting therefrom and discrimination against appellant, the collection of the disputed taxes "would operate as a denial to your orator of the equal protection of the laws, and would deprive your orator of its property without due process of law, contrary to the Constitution of the State of Colorado and to the Constitution of the United States in such case made and provided" (printed Rec., pp. 11 and

12). The fact that the State Constitution, as well as that of the United States, is referred to does not, of course, diminish the force of the Federal constitutional question presented.

Home Telephone & Telegraph Co. *vs.* Los Angeles, 227 U. S., 278.

It follows, therefore, that by the averments of appellant's initial pleading jurisdiction of the trial court was, in accordance with subdivision first of section 24 of the Judicial Code, founded both upon diversity of citizenship and also upon the ground that the case arises under the Constitution of the United States. If the charges in the bill are sustained, it admits of no doubt that the provisions of the Fourteenth Amendment, both in respect to due process and also in respect to equal protection of the laws, would be violated if the threatened acts were permitted to be done.

This being so, the case is clearly one of which the Circuit Court of Appeals has not final appellate jurisdiction (Judicial Code, sec. 128); and since the matter in controversy exceeds $1,000, besides costs, appellant is entitled as of right to an appeal to the Supreme Court of the United States, provided the decision of the Circuit Court of Appeals amounts to a final disposition of the case (Judicial Code, sec. 241).

Mayor of Vicksburg *vs.* Henson, 231 U. S., 259, 267.

Ohio Railroad Commission *vs.* Worthington, 225 U. S., 101, 105.

Macfadden *vs.* United States, 213 U. S., 288, 294.

Henningsen *vs.* United States Fidelity & Guaranty Co., 208 U. S., 404, 409.

Mississippi Railroad Commission *vs.* Illinois Central R. R. Co., 203 U. S., 335, 341.

Spreckels Sugar Refining Co. *vs.* McClain, 192 U. S., 397, 408 409.

Howard *vs.* United States, 184 U. S., 676, 681.

If, therefore, the trial court had dismissed the bill and the Circuit Court of Appeals had affirmed that order, beyond

doubt an appeal would lie, as of right, to the Supreme Court.

But the trial court simply denied the application for temporary injunction. On appeal from that order, taken under section 129 of the Judicial Code, the Circuit Court of Appeals decided that the case was not one of equitable cognizance, and that therefore the suit could not be maintained, and directed, in effect, a dismissal of the bill. In pursuing that course the court was well within its unquestionable powers.

City of Denver *vs.* New York Trust Co., 229 U. S., 123, 136.

United States Fidelity & Guaranty Co. *vs.* Bray, 225 U. S., 205, 214.

Harriman *vs.* Northern Securities Co., 197 U. S., 244, 287.

Castner *vs.* Coffman, 178 U. S., 168, 183, 184.

Mast, Foos & Co. *vs.* Stover M'f'g Co., 177 U. S., 485, 495.

Smith *vs.* Vulcan Iron Works, 165 U. S., 518, 525.

We contend that the determination was erroneous, but do not attack the power of the court to make it. That the determination as made, if it stands, puts an end to this suit does not admit of any doubt. The court decided (217 Fed., 544) that the Colorado statute excluded the right to resort to equity; that "its object was to give an action at law for the recovery of sums paid on account of invalid taxes, in place of a suit in equity to restrain their collection," and that it "abolishes the right to stay the collection of public revenues by injunction." And, speaking of the application of Revised Statutes, sec. 723, to this case, the court held (217 Fed., 546) that, "It can be given effect in no other way than by dismissing suits brought in violation of its provisions. We decline, therefore, to express any opinion touching the validity of the tax. That issue must be determined in an action under the statute." The last sentence refers to an action at law to recover back moneys paid to discharge said invalid taxes, which the court holds to be appellant's sole remedy.

That the present suit cannot be converted into such action at law is plainly held in the prevailing opinion denying the petition for rehearing, wherein the court concludes as follows (222-Fed., 659):

> "As the plaintiff has not paid its taxes, it has no standing in any court, either of law or equity, to have the amount of its refund, if any, ascertained."

Under this decision it is the imperative duty of the trial court immediately upon the receipt of mandate to dismiss the present suit. In so doing it will be merely carrying into effect the decision of the appellate court, and its act will be ministerial only, and not judicial. Of course, mandate has not yet been issued, because of a stay order (printed Rec., p. 420). But the decision as made authorizes and requires a mandate directing the court below to dismiss the bill. This being true, appellant is entitled as of right to an immediate appeal to the Supreme Court, notwithstanding the fact that the case came here on appeal from an interlocutory order denying an injunction.

> United States Fidelity & Guaranty Co. *vs.* Bray, 225 U. S., 205, 206, 214, 215.

Even though the mandate, when issued, merely sent the case back for further proceedings, nevertheless in view of the nature of the decision, that decision would necessarily be held a final determination of the case which could not subsequently be reviewed except by the immediate appeal here sought. The final judgment and decree dismissing the bill would be that of the Circuit Court of Appeals, and not of the district court.

> Metropolitan Water Co. *vs.* Kaw Valley Drainage Dist., 223 U. S., 519, 520, 523, 524.
>
> Brown *vs.* Alton Water Co., 222 U. S., 325.
>
> Union Trust Co. *vs.* Westhus, 228 U. S., 519.
>
> Smith *vs.* Vulcan Iron Works, 165 U. S., 518, 525, 526.

Under similar circumstances such an appeal was entertained by the Supreme Court, even though the Circuit Court of Appeals had expressly refused to dismiss the bill or to direct the lower court so to do.

Western Union Telegraph Co. *vs.* Pennsylvania R. R., 195 U. S., 540, 547.

In the case last cited the Circuit Court of Appeals, though considering an appeal from an order granting a temporary injunction, had announced principles which were decisive of the case (Western Union Telegraph Co. *vs.* Pennsylvania R. R. Co., 123 Fed., 33).

In Harriman *vs.* Northern Securities Company, 197 U. S., 244, 287, the case of Western Union Telegraph Co. *vs.* Pennsylvania Railroad, *supra*, in so far as it related to the appellate jurisdiction of the court and the method by which it was invoked and in which it was exercised, was expressly approved.

Indeed, it is the general and well settled rule that where the decision of the intermediate appellate court, either expressly or by its necessary effect, terminates the litigation, the judgment or decree of such court is final and justifies an appeal or writ of error to review the same, without waiting for the trial court to enter the final judgment or decree, which the decision of the intermediate appellate court requires.

Board of Commissioners *vs.* Lucas, 93 U. S., 108, 113, 114.

Chesapeake, etc., Telephone Co. *vs.* Manning, 186 U. S., 238, 240, 241.

Mower *vs.* Fletcher, 114 U. S., 127.

Atherton *vs.* Fowler, 91 U. S., 143, 145, 146.

O'Dowd *vs.* Russell, 14 Wall., 402, 404, 405.

It is true that no mandate has been issued which expressly directs the trial court to dismiss the bill. In fact, as noted above, no mandate at all has been issued, and the opinion both justifies and requires a mandate directing such dis-

missal. But such an express direction by the intermediate appellate court is by no means necessary to render its decision final, in the sense that it finally disposes of the litigation, and so subject to review by appeal or writ of error.

Upon an appeal in an equity case the opinion of the appellate court constitutes its decree. It is the imperative duty of the trial court to follow the same strictly, even though that duty be not expressly enjoined by the terms of the mandate. And if the decision of the appellate court is such that when followed by the trial court it results in the dismissal of the bill, it is a final decision of the case, even though the mandate does not in terms order such dismissal.

In United States *vs.* Beatty, 232 U. S., 466, the court, in holding that the decision of the Circuit Court of Appeals there involved was not final in this sense, defined a decision of the Circuit Court of Appeals which would be so final as being one "final *either in form or substance.*"

Western Union Telegraph Co. *vs.* Pennsylvania R. R. Co., 195 U. S., 540, 547, seems to us decisive upon this point. The trial court had ordered a preliminary injunction. Upon appeal from this order it was reversed by the Circuit Court of Appeals, the latter court making such determinations in its opinion as necessarily required dismissal of the bill (123 Fed., 33). The decree entered by the Circuit Court of Appeals, however, simply reversed the order of the circuit court which had granted the preliminary injunction. It did not direct dismissal of the bill. The telegraph company moved that the decree be modified so as to direct the dismissal of the bill, but the Circuit Court of Appeals refused to so modify its decree. Notwithstanding this, the telegraph company took an appeal to this court, upon the theory that the decision of the Circuit Court of Appeals necessarily determined the litigation. The appeal was entertained by this court, although the situation as above outlined was expressly noticed.

In Brown *vs.* Alton Water Co., 222 U. S., 325, it appeared that the case had previously been to the Circuit Court of Appeals and certain phases of it there determined (166 Fed.,

840). But the questions determined did not necessarily dispose of the entire case. Upon return of the case to the circuit court further proceedings were had and a certain decree entered, from which a direct appeal to this court was attempted to be taken. The court held that it could not entertain the direct appeal, because as to the points covered by the previous decision the subsequent action taken by the circuit court was merely ministerial, and was in fact the action of the Circuit Court of Appeals itself, which could only be reviewed upon an appellate proceeding directed to the Circuit Court of Appeals, and not to the circuit court. This court said (222 U. S., 331):

> "It is not disputable that the action of the court below on the question of jurisdiction was the necessary result of the decision of the Circuit Court of Appeals, since it was the *imperative duty* of the Circuit Court to give effect to that decision. * * *"
>
> (Page 332.) "More immediately the fault of the argument consists in disregarding *the duty of the Circuit Court to apply the law of the case arising from the decision of the Circuit Court of Appeals*,—an error hitherto pointed out in Aspen Mining & Milling Co. *vs.* Billings, 150 U. S., 31." (Italics ours.)

In Metropolitan Water Co. *vs.* Kaw Valley Drainage District, 223 U. S., 519, it appeared that the circuit court had granted a temporary injunction. On appeal from this order the Circuit Court of Appeals reversed it, putting its decision upon a ground which necessarily required dismissal of the bill (186 Fed., 315). The mandate of the Circuit Court of Appeals, however, did not direct its dismissal. Thereafter the circuit court dismissed the bill, and a direct appeal was taken to this court. This court, however, dismissed the appeal, holding that the action of the circuit court in dismissing the bill was the logical and necessary result of the opinion of the Circuit Court of Appeals, and therefore, in reality, the action of the latter court, which could be reviewed only by appellate proceedings directed to the Circuit Court of Appeals.

and not to the circuit court. This court said (223 U. S., 521):

> "When, therefore, the circuit court followed the opinion to its logical conclusion and dismissed the bill *it did only what it was bound to do.* * * *"
>
> (Page 523.) "We need not consider when a writ of certiorari may issue to review decisions on interlocutory orders by the Circuit Court of Appeals, for in any event its judgment in the present case must be treated *as equivalent to a direction to enter a final decree against the complainant for want of jurisdiction.*" (Italics ours.)

It is true that the mandate of the Circuit Court of Appeals considered in the foregoing case directed the circuit court to proceed "in accordance with the opinion of this court." But this direction necessarily exists in every mandate, even though not in terms stated, for it is the imperative duty of the lower court to follow a prior opinion delivered by the reviewing court in the same case, and that duty may be enforced by mandamus.

In Union Trust Co. *vs.* Westhus, 228 U. S., 519, the case of Metropolitan Co. *vs.* Kaw Valley District, *supra,* was reviewed and reaffirmed, this court saying (page 524) that "it was there pointed out that the attempt *to make a distinction upon the mere form of the mandate was without merit.*" (Italics ours.)

O'Dowd *vs.* Russell, 14 Wall., 402, involved a motion to dismiss a writ of error directed to the Supreme Court of Georgia, whereby it was sought to reverse a determination of the latter court which had in turn reversed a decision by the lower court relieving one Walker from responsibility because of a discharge in bankruptcy. The Supreme Court of Georgia had not in its decision, or by its mandate, directed the lower court to enter a judgment against Walker (Jones & O'Dowd *vs.* Russell, 44 Ga., 460). Nevertheless, this court held (14 Wall., 404) that the decision of the Supreme Court

of Georgia necessarily disposed of the controversy, and therefore was final in such sense as to support the writ of error.

In Bailey *vs.* Willeford (C. C. A., 4th Cir.), 131 Fed., 242, it appeared that the only order actually entered by the trial court was a decree, interlocutory in form, dissolving a preliminary restraining order. By the opinion of the lower court, however, this order was based upon grounds which necessarily required the dismissal of the bill. There was, however, no decree actually dismissing the bill. Nevertheless, the Circuit Court of Appeals for the Fourth Circuit held that the order was appealable because, as appeared from the opinion of the lower court, the dismissal of the bill would necessarily follow.

In Commissioners *vs.* Lucas, 93 U. S., 108, at 113, this court said:

> "If by any direction the entire cause is *in fact* determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, subject in a proper case to our review, *whatever may be its technical designation.*" (Italics ours.)

In general, as to the imperative duty of the trial court to strictly follow the previous opinion of the appellate court in the same cause, although the mandate contain no express direction, see:

Bissell Carpet Sweeper Co. *vs.* Goshen Sweeper Co. (C. C. A., 6th Cir.), 72 Fed., 545, 548, 552.

The above case cited with approval, 223 U. S., 523.

In re Potts, 166 U. S., 263.

Eastern Cherokees *vs.* United States 225 U. S., 572, 582.

Chaires *vs.* United States, 3 How., 611, 619.

Clark *vs.* Keith, 106 U. S., 464.

Sibbald *vs.* United States, 12 Pet., 488, 492.

2. *Jurisdiction on Certiorari.*

We are confident of the propriety of the appeal. But if for any reason the court should hold that under the circumstances here presented appeal will not lie, it does not admit of doubt, we think, that by reason of such ruling the case will be brought within the category of those as to which certiorari will lie. Of course, certiorari, unlike appeal, is not a matter of right. Even though the power in a particular instance to issue the writ exists, the court is not obliged to exercise it. Although we deem it to be beyond question that power exists to issue the writ to bring up for review any decision of a Circuit Court of Appeals from which an appeal may not be taken, or to which a writ of error will not lie, nevertheless we recognize that the writ will not for that reason alone and in every instance issue. Although the power beyond question exists, the determination of the propriety of its exercise rests in each instance in the sound judicial discretion of the court. That such discretion should in this instance be exercised in favor of the issuance of the writ does not we think admit of doubt, if it be true that appeal will not at this time lie to review the determination of the Circuit Court of Appeals. This subject was fully discussed in the petition for the writ of certiorari heretofore filed and now pending herein; in the brief supporting said petition, particularly at pages 1 to 6 and 149 to 155 thereof, and in our principal brief lately filed herein, particularly at pages 1 to 6, 15 to 18, 21 to 28, and 279 to 291 thereof. What is there set forth need not be here repeated.

So far as the question of power is concerned, it does not admit of any doubt, we respectfully submit, that if we assume the non-existence of the right of appeal this court has power, which it may exercise if it sees fit, to issue the writ of certiorari for the purpose of bringing up for immediate review the decision of the Circuit Court of Appeals which is complained of. This power exists either under section 240 or under section 262 of the Judicial Code.

(a) *Under section* 240 *of the Judicial Code.*

Section 240 of the Judicial Code provides:

> "In any case, civil or criminal, *in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of this title,* it shall be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of any party thereto, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." (Italics ours.)

Section 241 of the Judicial Code provides:

> "In any case *in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title,* there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs." (Italics ours.)

From the foregoing provisions of the Judicial Code it is manifest that all judgments and decrees of the Circuit Court of Appeals are made subject to review by this court either upon appeal or writ of error, or else by certiorari. For this purpose all judgments and decrees of the Circuit Court of Appeals are divided into two classes, to wit, First, those "in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of this title;" Second, those "in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of this title." All judgments and decrees which fall within the first class mentioned above *may* be reviewed by this court upon certiorari. All judgments and decrees which fall within the second class mentioned above *shall* be reviewed by this court upon appeal or writ of error. But in the case at bar the de-

cision and decree of the Circuit Court of Appeals, though rendered upon appeal from an interlocutory order, is either final in the sense that it disposes of the entire controversy and determines the litigation, in which event there is of right an appeal to this court (United States Fidelity & Guaranty Co. *vs.* Bray, 225 U. S., 205); or else it is a decree of the Circuit Court of Appeals * * * made final by the provisions of this title" (The Judicial Code), in which event certiorari will lie. The latter statement is correct because section 129 of the Judicial Code, which provides for an appeal to the Circuit Court of Appeals from an interlocutory order relating to an injunction, makes the decision and decree of the latter court final, in that it permits no further appeal therefrom or writ of error thereto. And this is true although said section 129 authorizes such an appeal to the Circuit Court of Appeals even in a case which "might upon final decree under the statutes regulating the same, be taken directly to the Supreme Court."

Section 129 of the Judicial Code provides in part as follows:

> "Where upon a hearing in equity in a district court, or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, or an interlocutory order or decree shall be made appointing a receiver, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve, an injunction, or appointing a receiver, to the Circuit Court of Appeals, notwithstanding an appeal in such case might, upon final decree under the statutes regulating the same, be taken directly to the Supreme Court."

It was the purpose of the Court of Appeals Act of 1891, and it is equally the purpose of the Judicial Code, that every decision of the Circuit Court of Appeals, whatever be its nature, shall be subject to review by this court either as a matter of right by appeal or writ of error, or else upon certio-

rari. While it was intended by said act to relieve the crowded docket of this court by reducing the number of cases which might as a matter of right be brought here by appeal or writ of error, yet it was equally the intention of said act that as to all other decisions of the Circuit Court of Appeals this court should have the power by certiorari to review them, whenever in its judgment such review was deemed necessary or advisable. That such was the purpose of the Court of Appeals Act of 1891 and is the purpose of the Judicial Code has been clearly stated.

> Forsyth *vs.* Hammond, 166 U. S., 506, 511, 512, 513.
>
> Louisville & Nashville *vs.* Behlmer, 169 U. S., 644, 646.
>
> Brown *vs.* Alton Water Co., 222 U. S., 325, 333.

It follows inevitably that if a decision or decree of the Circuit Court of Appeals be one from which an appeal may not be taken, or to which a writ of error may not be directed, then, by reason of that fact, certiorari will lie. Otherwise the purpose of the statute will be defeated, and a large class of cases will exist in which the decisions and decrees of the Circuit Court of Appeals, even though they be final in effect, cannot be reviewed by this court. A simple illustration will make this clear. Under section 129 of the Judicial Code an appeal from an interlocutory order in an injunction matter may be taken to the Circuit Court of Appeals, even though the case be one wherein an appeal from the final decree of the trial court must come directly to this court. Under sections 238 and 128 of the Judicial Code, an appeal from a final decree of the district court in a case wherein Federal jurisdiction is founded upon the existence of a Federal constitutional question must be taken directly to this court. Such an appeal from the final decree of the district court in such a case may not be taken to the Circuit Court of Appeals (Union & Planters Bank *vs.* Memphis, 189 U. S., 71). But in such a case the appeal from an interlocutory order relat-

ing to an injunction must be to the Circuit Court of Appeals, and cannot come to this court (Judicial Code, sec. 129).

If, therefore, in the case at bar Federal jurisdiction had been invoked solely upon the ground that a Federal constitutional question was involved, and if upon appeal to the Circuit Court of Appeals from the order denying the preliminary injunction that court had rendered such a decision as is here complained of, which is final in effect, if not in form, and necessarily terminates the litigation, that decision could never be reviewed by this court unless either an immediate appeal might be taken from the Circuit Court of Appeals to this court, or unless this court could forthwith issue its writ of certiorari directed to the Circuit Court of Appeals to bring up its decision for review. Under such circumstances it would not be possible to await the action of the district court which would inevitably follow the decision of the Circuit Court of Appeals and then attempt to obtain a review by this court through the medium of the direct appeal, which is the sole remedy provided by the statute for the review of a final decree of the district court in such a case. This point is settled beyond question.

Brown *vs.* Alton Water Co., 222 U. S., 325.

Metropolitan Water Co. *vs.* Kaw Valley Drainage Dist., 223 U. S., 519.

Union Trust Co. *vs.* Westhus, 228 U. S., 519.

And in such a case it would be equally impossible to appeal from the final decree of the district court to the Circuit Court of Appeals and thence to this court, because the statute forbids it.

True it is, that in the case at bar, Federal jurisdiction was rested not only upon the ground of a Federal constitutional question, but also upon diversity of citizenship. But section 240 of the Judicial Code, which provides for the issuance of the writ of certiorari, makes no distinction on this ground between the cases in which the writ may be issued. The statute means the same thing in the one case as in the

other. And if in this case the Supreme Court would have had power to issue the writ of certiorari to review the decision of the Circuit Court of Appeals, provided Federal jurisdiction had been originally invoked in the district court solely on the ground of the existence of a Federal constitutional question, it necessarily results that the Supreme Court has the same power to issue the writ, notwithstanding the fact that Federal jurisdiction was originally invoked not only because of the Federal question, but also because of diversity of citizenship.

Western Union Telegraph Co. *vs.* Pennsylvania R. R., 195 U. S., 540, is, we submit, conclusive authority that this court has jurisdiction to now review the decision of the Circuit Court of Appeals here complained of, either upon the appeal which has been taken or upon the certiorari which is sought. In that case Federal jurisdiction in the circuit court was invoked, not only on the ground of diversity of citizenship (195 U. S., 541), but also upon the ground that the case arose under the laws of the United States, to wit: Certain acts of Congress under which it was claimed the Telegraph Company was entitled to maintain its lines on the right of way of the Railroad Company (195 U. S., 547). The case, therefore, was one in which the decision of the Circuit Court of Appeals, even upon appeal from the final decree of the circuit court, would not have been final, but an appeal therefrom could as a matter of right be taken to this court. The case also was one in which an appeal from the final decree of the circuit court need not be directly to this court. The case also was one in which an appeal Circuit Court of Appeals. Under these conditions, a preliminary injunction was ordered by the circuit court, and upon appeal the order was reversed by the Circuit Court of Appeals (123 Fed., 33; 195 U. S., 549). The Circuit Court of Appeals, however, in reversing said order determined questions necessarily decisive of the case. It did not, however, order the dismissal of the bill. On the contrary, it

expressly declined to do so. Nevertheless, the Telegraph Company took an appeal from the Circuit Court of Appeals to this court. Thereafter, the circuit court, evidently pursuant to the decision of the Circuit Court of Appeals, dismissed the bill. From this decree the Telegraph Company appealed to the Circuit Court of Appeals. While the proceedings were in this situation, and prior to any decision by the Circuit Court of Appeals upon the second appeal, this court issued its writ of certiorari whereby the case was brought here for determination. This court entertained jurisdiction, both upon the appeal which had been originally taken and upon the certiorari which had later been issued, and, not questioning the propriety of either, decided the substantial issues involved (195 U. S., 540, 547). The fact that a final decree had actually been entered in the circuit court and an appeal therefrom taken to the Circuit Court of Appeals prior to the issuance of the certiorari is of no importance, for it has been many times held that the writ of certiorari may issue at any stage of the proceedings and without regard to whether final or any disposition of the case has been made by the Circuit Court of Appeals.

Loveland on Appellate Jurisdiction in Federal Courts, sec. 294, and cases cited.

Indeed, if the case be one which is not as a matter of right appealable to this court, certiorari may issue, although neither the trial court nor the Circuit Court of Appeals has by its order or decision disposed of the case.

Harriman *vs.* Northern Securities Co., 197 U. S., 244, 287.

City & County of Denver *vs.* New York Trust Co., 229 U. S., 123.

It is, therefore, plain that in Western Union Telegraph Co. *vs.* Pennsylvania R. R., *supra*, the final decree entered by the trial court subsequent to the decision of the Circuit Court of Appeals and the appeal therefrom to the Circuit

Court of Appeals in no wise aided to bring the case within the scope of this court's power to issue the writ of certiorari. So far as the question of power was concerned, said writ could as well have been issued prior to said proceedings as thereafter.

It follows as an inevitable conclusion that in Western Union Telegraph Co. *vs.* Pennsylvania R. R., *supra,* as in the case at bar, this court had and has jurisdiction, either upon the appeal or upon the certiorari. If the appeal does not lie, its failure is due to a cause which renders certiorari available. In Western Union Telegraph Co. *vs.* Pennsylvania R. R., *supra,* either the appeal was well taken or the certiorari was proper, or the court was without jurisdiction. But the court exercised jurisdiction and decided the substantial questions in the case. Therefore, it is true that either the appeal was well taken or the certiorari was proper. That one or the other was correct does not admit of doubt. The same result must follow here.

In Harriman *vs.* Northern Securities Co., 197 U. S., 242, 287; Western Union Telegraph Co. *vs.* Pennsylvania R. R., *supra,* was, insofar as this phase of the case is concerned, in all things expressly reaffirmed.

(*b*) *Under Section* 262 *of the Judicial Code, formerly Section* 716 *of the Revised Statutes.*

Section 262 of the Judicial Code provides:

> "The Supreme Court and the district courts shall have power to issue writs of *scire facias.* The Supreme Court, the Circuit Courts of Appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

We regard as indubitable the power of this court to issue the writ of certiorari under section 240 of the Judicial Code,

if we assume that the appeal will not lie. If, however, this for any reason be doubted, we submit that there is no question concerning the power of this court to issue the writ under section 262 quoted above. The section last mentioned, which was formerly section 716 of the Revised Statutes, has often been referred to as conferring a power which is plenary.

In re Chetwood, 165 U. S., 443, 462.
McClellan *vs.* Carland, 217 U. S., 268, 278, 279.

In United States *vs.* Beatty, 232 U. S., 463, 467, it is said:

> "No doubt this provision (Section 262 of the Judicial Code) contemplates the employment of the writ of certiorari in instances not covered by section 240, and affords ample authority for using the writ as an auxiliary process and whenever there is imperative necessity therefor, as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of other injustices in other kindred ways."

In two recent cases the writ has been issued under section 262, although Federal jurisdiction was invoked in the trial court upon such grounds that a final decision of the trial court was subject to review by this court upon appeal or writ of error. We refer to

Meeker *vs.* Lehigh Valley, 234 U. S., 749, 750; 236 U. S., 412; 236 U. S., 434.
United States *vs.* Chicago, Burlington & Quincy, 237 U. S., 410.

In the Meeker case, *supra*, the suit was based upon the Interstate Commerce Act, and Federal jurisdiction was, as we understand it, invoked upon that ground. The plaintiff prevailed in the trial court, but the Circuit Court of Appeals reversed the judgment (211 Fed., 785). The decision of the Circuit Court of Appeals did not, however, finally dis-

pose of the case. It is evident that after the decision of the Circuit Court of Appeals the case might have gone back to the district court, been tried again, a second writ of error sued out from the Circuit Court of Appeals, and when the Circuit Court of Appeals did actually finally dispose of the litigation a review might have been had, as a matter of right, upon writ of error from this court. This court, however, did not hesitate to at once issue its writ of certiorari for the immediate review of the first decision of the Circuit Court of Appeals, without awaiting the further procedure mentioned above (234 U. S., 749, 750).

In United States *vs.* C., B. & Q., *supra*, the suit was by the United States and was based upon the Safety Appliance Act. Upon these grounds Federal jurisdiction of the court of first instance was invoked. The case was therefore one final, judgment in which might be reviewed by this court upon writ of error. The decision of the Circuit Court of Appeals (211 Fed., 12) did not finally dispose of the case. Nevertheless, without awaiting a return of the case to the trial court, its retrial there, the entry of a new judgment, subsequent proceedings for review in the Circuit Court of Appeals, and the entry of the final order there, this court, exercising the power granted by section 262 of the Judicial Code, immediately issued its writ of certiorari for the direct review and revision of the first decision of the Circuit Court of Appeals (237 U. S., 410, 411).

II.

EQUITY JURISDICTION. (Appellees' Brief, Pages 15-51.)

Appellees' contention upon the subject suggested by the foregoing headline has in the main been anticipated and fully discussed in our principal brief, pages 21 to 176. In many particulars our argument is fortified, rather than weakened, by appellees' contention.

For illustration, it is asserted by appellees (their brief,

pages 18 and 19) that the remedy under section 5750 is to pay the disputed tax, apply to the Board of County Commissioners for a refund, and if the refund be denied, to appeal to the State district court of the county, pursuant to section 1225 of the Revised Statutes. This contention of appellees emphasizes the unsettled and uncertain character of the supposed remedy which we have heretofore adverted to. This is made manifest when we consider that the Circuit Court of Appeals (217 Fed., 542; our principal brief, page 39) thought that after payment of the disputed tax it is quite unnecessary, under said section 5750, to apply to the County Commissioners for refund before bringing suit, the view of the learned court below being that the mere existence of said section 5750 authorizes the maintenance of such an action at law, either in the State or Federal court, that in such suit the question as to whether the taxes paid are erroneous or illegal is to be determined, and that if they are thereby "found to be erroneous or illegal" and judgment is entered for the recovery of the money paid in their discharge, then for the first time application is to be made to the Board of County Commissioners, and by said section 5750 the board is required to pay the judgments.

The unsettled and uncertain character of the supposed remedy is further made manifest when we consider that this court, when considering a former case from Colorado (Singer Sewing Machine Company *vs.* Benedict, 229 U. S., 481-487) thought that if the taxes in question were illegal and void, the company "could pay them, and if the commissioners refused to refund, have its action against the county to recover back the money," which action might be in the Federal court. Appellees, however, assert, as stated above, that the sole remedy is payment of the tax, application to the County Commissioners for refund, and the statutory appeal to the State district court if the application be denied. It will thus be seen that in considering the supposed remedy under the Colorado statute, this court, the circuit court, and appellees' counsel, each arrive at a different conclusion, and

the conclusion of each disagrees with that of both of the others. Meanwhile, the Colorado statute is silent, and the decisions of its courts give no hint as to the mode of procedure.

As to appellees' contention upon this point, it is impossible to understand how, since the passage of the act of 1913 (our principal brief, page 33), an appeal could be taken under section 1225 of the Revised Statutes from an order denying refund in a case where the refund had been allowed by the Board of County Commissioners and such allowance disapproved by the State Tax Commissioner. In such event the disallowance would be by the State Tax Commission, and not by the Board of County Commissioners, and yet section 1225 of the Revised Statutes allows the statutory appeal to the district court only when a claim "shall be disallowed in whole or in part by the Board of Commissioners (County Commissioners)."

Moreover, the remedy suggested by appellees, and which their counsel say is the sole remedy, in so far as it permits any proceeding in court at all, confines it to the statutory appeal, which by the terms of the statute must be taken to the State district court, and obviously cannot be taken to the Federal district court. For this reason alone it fails of being such an adequate remedy as will deprive the Federal court of equity of jurisdiction. (See authorities cited in our former brief, page 57.)

It is further suggested by appellees (their brief, pages 23 and 24) that in case, upon the statutory appeal, judgment for the refund is recovered in the State district court, "the same is paid by the county by a levy upon all of the property of that county subject to taxation. No other method could be pursued. In the case at bar, as often happens, the erroneous tax (so claimed) is upon property located in several subdivisions of the county, and likewise is collected for State, so-called county and other purposes, such as school districts, cities, towns, and other taxing districts. To correct the error, if error there be, in justice the burden must be borne, as is

the clear contemplation of the statute in question, by the several divisions and taxing districts of the county which had received the excessive benefit."

Here, again, appellees' counsel disagree with the learned Circuit Court of Appeals in respect of the supposed remedy at law and the method of its enforcement. The Circuit Court of Appeals (217 Fed., 545; our principal brief, pages 43 and 44) held that the refund was to be made by the County Treasurer out of funds in his possession belonging to the cities, towns and school districts, and not from the proceeds of a county tax, assessed and levied for the purpose of making such refund. Doubtless this holding was made because we had demonstrated conclusively, as we think, that the Constitution, as well as the statutes, of Colorado prohibits a county levy for any such purpose, and likewise prohibits the county and the County Commissioners from making any levy for city, town or school district purposes, or which would be applicable only to property within such cities, towns or school districts. (See our former brief, pages 40 to 57.)

It follows that the sole remedy afforded by the Colorado statute, as asserted by appellees' counsel, is one which cannot be enforced, because its enforcement would conflict with the Colorado Constitution, as is, inferentially at least, conceded by the learned Circuit Court of Appeals, and it also follows that the remedy suggested by the learned Circuit Court of Appeals is, according to the present contention and concession of appellees' counsel, non-existent.

Certain suggestions were made by appellees in their brief opposing certiorari which are not repeated or in any manner referred to in their principal brief, recently filed. Whether they are thereby abandoned is not clear. In any event, they are without merit. For example, in their brief opposing certiorari appellees assert (page 58) that the assessment and levy of a tax does not in Colorado create a lien and, therefore, is not a cloud upon real estate. Certainly since 1902 the law in Colorado has been otherwise. It is unnecessary to consider what the law was prior to said date. By the

statute of 1902, which is still in effect (Colorado Session Laws, 1902, page 43, section 3; Revised Statutes, 1908, section 5530), it is expressly provided:

> "Taxes levied on any real estate shall be a perpetual lien upon such real estate until such taxes and any penalty, charges and interest which may accrue thereon shall be paid."

Moreover, the statutes of Colorado, reviewed in our principal brief (page 162), expressly provide for the sale of railroad property to satisfy delinquent taxes and the giving of a deed therefor, with apparently no right of redemption, which deed shall be *prima facie* evidence of the legality of the tax and the regularity of the proceedings, and further provide that prior to sale the treasurer's books, the assessment rolls and the tax warrants shall have the same legal and evidential effect. Moreover, the Supreme Court of Colorado has time and again held, as is evident from the review of its decisions in our principal brief (pages 122 to 138) that the mere existence of the tax prior to the sale constitutes a lien and, therefore, a cloud upon the title to real estate, which will justify the interposition of equity to remove the same.

Not only this, but, as is well known, equity intervenes not only to remove a cloud upon title already existing, but also to prevent the creation of such a cloud which is threatened; and here, confessedly, the deed, which will inevitably follow the sale, will create such a cloud and, likewise confessedly, the sale will be made unless prevented by injunction.

The authorities cited by appellees (their brief opposing certiorari, pages 58 and 59) consist entirely of Colorado cases decided prior to 1902. In Morris *vs.* Bank, 17 Colorado, 231 (decided in 1892), there was involved a suit in equity to remove a cloud upon real estate created by a tax deed. No question was involved concerning the lien of the tax, itself, for that had been canceled by the sale which resulted in the deed. The sole question was as to what statute of limitations applied to such a suit, and the court

held that the statutory period of limitation did not begin to run until the date of the recording of the deed, because under the Colorado statute relating to tax deeds at that date, and not before, such a deed became operative as a conveyance, and, therefore, at that date, and not before, became a cloud upon the title. Nothing was said concerning the lien and consequent cloud of a tax on real estate prior to sale, and there is a plain intimation by the court (page 241) that a suit in equity might have been maintained to enjoin the recording of the deed, and consequent creation of the cloud.

Wason *vs.* Major, 10 Colorado Appeals, 185 (decided in 1897), so far as it relates to tax deeds, follows the Morris case and announces the same doctrine. So far as it relates to the lien and consequent cloud created by the tax prior to sale, it is held that in that particular instance no such cloud was created, because the tax was void on its face, if the contention of those attacking the same was correct, for the reason that the statute under which the assessment and levy was made was, according to such contention, absolutely unconstitutional and void. It is interesting to note that in this case the right to invoke the jurisdiction of equity and to have injunctive relief is recognized, provided the case is brought within one of the recognized heads of jurisdiction, such as avoidance of multiplicity of suits or prevention of cloud on title.

People *vs.* District Court, 29 Colorado, 182 (decided in 1901), involved an original proceeding in the Supreme Court to obtain a writ of prohibition against a State district court which had entertained a bill to enjoin action by the so-called State Board of Assessors, which had been created by a statute of Colorado, then recent, but since repealed. Several opinions were filed by the different members of the Colorado Supreme Court. The quotation made by appellees is from the opinion of Mr. Justice Steele (29 Colorado, 201 and 202). The specially concurring opinion of Mr. Justice Gabbert (page 203) is, upon this point, to the contrary effect. Mr. Justice Steele delivered a further opinion (page

210), as likewise did Mr. Justice Gabbert (page 216), and the opinion upon rehearing (page 227), delivered by Mr. Justice Gabbert and concurred in by Chief Justice Campbell, makes clear the fact that the statement of Mr. Justice Steele quoted by appellees is not concurred in by the other two members of the court, as is made further apparent by the final dissenting opinion of Mr. Justice Steele (page 250).

It is interesting to note that after the foregoing decision by the Supreme Court of Colorado the railroads filed a bill in the Circuit Court of the United States for the District of Colorado, seeking an injunction against the certifying out of the assessments which had been made by said State Board of Assessors, and the court, through his honor Judge Riner, granted the injunction, delivering in connection therewith an elaborate opinion, which is reported.

Union Pacific *vs.* Alexander, 113 Fed., 347 (decided December 30, 1901). It is plain that Judge Riner took the same view concerning the effect of the several opinions in People *vs.* District Court, 29 Colorado, 182, as that which we have hereinabove expressed.

Finally, appellees say (their brief opposing certiorari, pages 73 and 74) that the collection of the disputed tax ought not to be enjoined, because, if collected, it will be expended for lawful purposes, and therefore the railroad company ought to submit to having its money taken from it at this time and be satisfied with a subsequent refund of that proportion of the same which was unlawfully taken; but this is the merest sophistry. Such reasoning would justify theft and forbid resistance to the robber, upon the theory that the proceeds of the crime were to be devoted to a purpose to which the victim ought in some measure to contribute.

Appellees' reasoning is further fallacious, because the money in question has not been expended by the State and county, the city, the towns and the school districts, for the reason that it has not yet come into their possession, and will not until the courts hold that the taxes in dispute are valid

and legal obligations of the railroad company, or until the money is wrested from the railroad company by superior force. Of course, it is the duty of the railroad company to contribute its just proportion of all taxes required to raise necessary revenues for every proper governmental purpose. This it has done in the past, and will do in the future most willingly, but the precise question here involved is as to whether the present demand of the tax collectors is not for an amount which greatly exceeds the railroad's just proportion, and, we respectfully submit, that that is a question which must be decided before the railroad company is required to part with its money.

III.

DEFENDANTS' CONTENTION THAT PROPERTY LOCALLY ASSESSABLE IN WELD COUNTY WAS FULLY ASSESSED. (Appellees' Brief, Pages 51-112.)

This subject is discussed in our former brief at pages 183-193, 212-279. Defendants, by failure to contest, seem to concede the correctness of the legal principles upon which we rely. They take their stand upon the assertion that in fact no disparity in assessment to the prejudice of plaintiff existed. This they attempt to establish by arguing (*a*) that the property in Weld County, other than that assessed by the State Tax Commission, was assessed by the local assessor at not less than one-third of its actual value; (*b*) that the property in Weld County assessed by the State Tax Commission was so assessed at not to exceed one-fifth of its actual value; from which they draw the conclusion that, if any disparity in assessment existed, it was not to the prejudice of plaintiff, so completing their syllogism. In their brief they first discuss premise (*a*), *supra*. We shall do the same.

At the outset we desire to emphasize the fact that upon this branch of the case defendants' discussion is confined exclu-

sively to land values. As to these, the sole argument made is that the lands in the various classes which the assessor assessed at all were not shown to have been assessed at less than 33⅓ per cent of their actual value. No reply whatever is made to the showing in our former brief (pp. 225, 226, 227) that lands were omitted from assessment or wrongly classified, resulting in a net value omitted of $4,386,840; no reference is made to the fact (p. 228 of our former brief) that the assessor omitted from assessment domestic animals having a value of $2,851,680; that he omitted from assessments (p. 230 of our former brief) farm implements and machinery having a value of $1,145,023; that he omitted from assessment (p. 234 of our former brief) water rights having a value of not less than $1,539,760, and probably more than $6,000,000; that he underassessed town and city lots and improvements thereon (p. 235 of our former brief) to the extent of $1,100,877; that he underassessed the tangible property of corporatoins, so that in the case of the Great Western Sugar Company alone (former brief, p. 236) the undervaluation was at least $1,485,000; that he purposely failed and refused to assess intangible values of all kinds (former brief, p. 237), thus omitting from assessment at least $1,800,000 of values, and probably many times that amount; that he did the same in respect to moneys, notes, and credits (former brief, p. 241), with the result that in the case of merchants' credits alone the values omitted were at least $3,080,840; that he did the same respecting bank deposits (former brief, p. 244), with the result that values to the extent of at least $2,376,283 escaped assessment; that he allowed excessive exemptions (former brief, p. 245) to the amount of at least $1,041,200, and probably twice that amount; that the evidence clearly indicated similar omissions and undervaluations in respect to other large classes of property, amounting in the aggregate to values in a very great sum, which entirely escaped assessment; that all these things were done systematically, habitually, intentionally, and in violation of the

Constitution and statutes (former brief, pp. 254-279). None of the foregoing matters are in any manner referred to in appellees' brief. From reading that brief one would be led to believe that nothing had been claimed by plaintiff except an underassessment by the local assessor of such lands as he saw fit to assess at all.

Since defendants do not take issue with us except upon the one point, we are justified in concluding that, for the purpose of this argument at least, they concede the correctness of our other contentions. But the undervaluation of lands amounts to about $18,000,000 (former brief, p. 231), out of a total of omissions and undervaluations amounting to more than $38,000,000 (former brief, p. 250), ascertained by an investigation of only a few out of the many different classes of property, in respect to all of which it is manifest that the local assessment was deficient. The showing is ample that, even though the undervaluation of lands be entirely put out of view, such discrimination existed as to fully justify the complaint made.

It will thus be seen that by deefndants' argument the inquiry has been limited to a very narrow scope, within which its determination one way or the other is by no means decisive of the case. But defendants' position, even upon their chosen ground, is untenable.

At pages 56-63 of their brief, defendants undertake to give a general description of conditions existing in Weld County, without any reference to pages of the record supporting these averments, which, we regret to state, largely emanate from the fertile brain of resourceful counsel.

At page 62 of the brief an alleged statement of Judge Lewis is quoted, which certainly appears nowhere in the record, and of which we have no recollection.

At page 64 of the brief the affidavit of Harry T. Proctor (Rec., p. 49) is critised. But this affidavit contained lists not only of the lands held for sale, but of lands actually sold during the year 1912, to which the assessment under examin-

ation related. The criticisms are based (*a*) upon advertisements of the United States Land Office (Rec., pp. 182, 183) to sell two small isolated tracts of public land, at the minimum price of $2.50 and $2 per acre, respectively. Being isolated and fractional lots, the minimum price named by the United States is certainly no guide to the general value of lands in that region. (*b*) A further criticism is made, based upon the testimony of certain witnesses as to the rental value of certain lands other than those described in the affidavit. How can this affect the question, especially when we consider that market value, and not rental value or return value, is the guide?

At page 65 of the brief the affidavit of G. A. Gaylor (Rec., p. 49) is criticised, the sole criticism being that the lands referred to are in the neighborhood of the Greeley-Poudre Irrigation District. We submit that the criticism is ill-founded, and refer to the affidavit for its refutation.

On page 66 of the brief the affidavit of Frank A. Ayer, a right-of-way agent of the Union Pacific (Rec., p. 45), is criticised. The criticism is that railroad right-of-way is necessarily purchased at a higher price than lands to be used for other purposes. But, as we now know, this is a mistaken view.

Minnesota Rate Cases, 230 U. S., 332, 452 *et seq.*

At page 68 of the brief the affidavit of Frank A. Hensley (Rec., p. 63) is criticised, principally because the lands described therein are situated in a certain irrigation district. It is further criticised because the assessed valuations for the year 1912 are set opposite the respective tracts; but this was done by Mr. Holcomb, as he himself testified (Rec., p. 276), who also gives the assessed valuations for the year 1910, showing that they did not exceed those in 1912.

At page 68 of the brief the affidavit of J. U. Harris, appraiser for the State Land Board, is criticised. This witness not only made an affidavit (Rec., p. 65), but also gave oral

testimony (Rec., p. 390 *et seq.*). Being a state official, specially charged with the duty and authority of valuing state lands for purpose of appraisement, his testimony was not only admissible, but peculiarly persuasive.

> Lynch *vs.* United States (C. C. A., 9th Cir.), 138 Fed., 535, 539.

In his affidavit (Rec., pp. 65-72) he gives a long list of appraisements made by himself, many of them in the years 1912 and 1913; also (Rec., pp. 73-75) a long list of sales made pursuant to said appraisements. The lands described are the dry lands of Weld County, such as the assessor regularly assessed at a valuation or one or two dollars per acre, although the appraisements and sale prices thereof proved beyond question that they were worth more than five times that amount. In his testimony (Rec., pp. 390-391) Mr. Harris describes at length the methods which he followed in making appraisements, including the ascertainment by direct inquiry of the market value of neighboring lands, stating (p. 390), as the result of all, that the average value per acre in 1912 of dry lands in Weld County was about $11, these being the lands which the assor continuously assessed at not to exceed $2 per acre. Defendants (p. 69 of their brief) specifically crticise the appraisement of Section 36, Township 6 North, Range 63, and atempt to discredit all of the witness' testimony because of this one appraisement: but it does not appear that this appraisement was incorrect, and it does not appear specifically that, whether correct or incorrect, said appraisement was not made by the witness Harris (Rec., p. 391).

Defendants (p. 70 of their brief) refer to adverse comment by Judge Lewis, but the record contains none, and to the best of our recollection none was made. There is absolutely no foundation for the statement of defendants that "the whole list of valuations given by this witness was like the above instance—flagrantly wide of the mark of truth."

At page 70 of their brief, defendants criticise the testimony of the witness Fairall (Rec., p. 265 *et seq.*), formerly secretary of the State Board of Equalization and the State Tax Commission. It is said that he selected a short list of transfers, the intimation being that he took only those where the recited consideration was much larger than the assessed valuation. He testified, without dispute (Rec., p. 266), that he took "all of the transfers by warranty deed from July, 1913, back to August, 1912, eliminating all that showed only a nominal consideration and that showed on their face to be either trades or transfers from one member of the family to another member, which might lead me to suspect that the consideration might be other than legitimate." He submitted this list to the present county assessor, and to a real-estate man in Greeley, and states (p. 267): "About 35 of these were verified by the assessor and the real estate man. The rest they knew nothing about. Only in about five cases out of three or four hundred did they think the price was inflated." The percentage of assessment to sales value (Rec., p. 268) on all of these transactions was 17.9 per cent, and on those which were verified by the assessor and the real-estate man the percentage was 19 per cent. Defendants claim that Mr. Fairall's testimony is fully met by that of Mr. Bliss, present county attorney, and of counsel in this case. Space will not permit a detailed discussion of this assertion. We can do no more than to request the court to compare the testimony of these two witnesses upon the point in question, with confidence that as a result of such examination defendants' contention cannot be sustained.

But defendants' principal attack (their brief, pp. 73 *et seq.*) is centered upon the affidavit of Arthur H. Scribner (Rec., pp. 50 *et seq.*), and the affidavit (Rec., pp. 76 *et seq.*) and testimony (Rec., pp. 272 *et seq.*) of George G. Holcomb. As stated in our former brief, Mr. Holcomb and Mr. Scribner spent many months in examining the records of Weld County and compiling a list of all sales of lands, other than

town and city lots, as evidenced by warranty deeds, which had occurred in said county between January 1, 1909, and June 6, 1913. Bearing in mind that, as pointed out in our former brief (p. 217 thereof), the statute of Colorado required the assessor to assess lands at their "market value," and not according to their intrinsic value, their rental value, their value as determined by capitalization of net returns from farming operations, or upon any other basis of valuation (Rev. Stats. 1908, sec. 5591), it is obvious that market value is to be determined by ascertaining the prices at which such lands were bought and sold. This accounts for the extraordinary effort made by plaintiff to ascertain these facts, and renders inexplicable the attitude of the assessor and his deputies in absolutely refusing to pay any attention to sale prices in arriving at their assessed valuations. This we have heretofore commented upon (former brief, p. 267). The lists of sales compiled by Mr. Holcomb and Mr. Scribner are attacked by defendants because, they say, the lists were made up of selected instances, chosen to produce a desired result favorable to plaintiff, and by rejecting a large number of sales at prices unfavorable to plaintiff's contention and favorable to that of defendants. It is even said (appellees' brief, p. 77) that all deeds were rejected where the recited consideration was less than $10 *per acre*. There is not one word of truth in these assertions, as the record demonstrates. The lists were confined to those transactions evidenced by warranty deeds, because in these the consideration would certainly not be overstated, it being to the interest of the grantor not to enlarge his liability upon the covenant of warranty. They embraced all the deeds of this character during the period of time covered, and involved no picking and choosing for any purpose whatsoever. No deeds at all were excluded from the lists save only those which upon their face showed clearly that the consideration had not been stated with accuracy. These matters are testified to by A. W. Scribner (Rec., p. 215), by George G. Holcomb (Rec., p.

273, 280), and by Arthur H. Scribner (Rec. p. 51); and their testimony is entirely undisputed. Mr. Holcomb says that the list of transfers "includes the warranty deeds in Weld County for forty acres or over, exclusive of deeds with a consideration which is nominal, or includes love and affection, and of deeds pursuant to contracts made years before. All nondescript deeds (description by metes and bounds) were also excluded, because of the difficulty in locating assessment in assessor's office. With these exceptions all warranty deeds between periods mentioned were taken." Not only were the deeds evidencing these transactions taken as they came, without any selection, but the accuracy of their statements as to considerations paid was in very many instances verified by interviewing parties directly concerned in the transactions, and in various other ways pointed out in our former brief (pp. 217-225 thereof); all of which renders the conclusion irresistible that regularly, systematically, and throughout the county the assessed valuation of these lands was considerably less than one-fifth of their actual value. Defendants (pp. 78-80 of their brief) seek to meet this showing by the testimony of Mr. Bliss, present county attorney and of counsel in this case, from which they assert that Mr. Holcomb and Mr. Scribner did not take all of the transfers recorded in Weld County, which is claimed to be reprehensible. Of course they did not, because they only attempted to take those which related to lands as distinguished from town or city lots, that being the class of property which they were then investigating, and also because they took of these only the transfers which were evidenced by warranty deeds. The other transfers testified about by Mr. Bliss were either transfers of town or city lots, or else transfers not evidenced by warranty deeds (Rec., pp. 361, 366). There is absolutely no testimony indicating that they rejected deeds of any sort because they contained a recited consideration of less than $10 per acre. Defendants' assertion to that effect (their brief, p. 77) is absolutely without foundation. But finally it is said that this entire list of trans-

fers, aggregating more than one thousand in number, is to be rejected altogether because Mr. Bliss in his testimony saw fit to criticise five of them. These alleged criticisms do not utterly annihilate even the transactions specifically attacked. Even in these five cases, admitting all that Mr. Bliss says to be true, the showing for plaintiff remains a strong one. But to say that a thousand sales must be cast aside because five are mildly criticised is to violate the precept *de minimis non curat lex.*

The evidence of these sales is further sought to be met by expressions of opinion, principally from the assessor and his deputies, relating to the value of the lands which were sold. These expressions of opinion are based upon the erroneous theory of value discussed in our former brief. This assessor and these deputies, one and all, repeatedly asserted that in determining the value of lands they paid no attention whatsoever to sale prices; that they did not know what lands were selling for, and made no effort to find out; and that, even if they had known of these sales, and upon investigation had ascertained that the considerations recited in the deeds were the prices actually paid, they would have given no heed thereto whatsoever, their theory being that lands were to be valued, not according to prices current, not according to market value as the statute required, not according to what people were willing to buy or sell the lands for, but according to what all of these witnesses denominated the return value—to wit, a capitalization, upon some basis or other, of the net return realizable from conducting agricultural operations according to the present practice.

This fundamental error pervades and vitiates all of the testimony presented by defendants on this phase of the case. The market value of property, which is the statutory standard, is the price which the property will bring in a fair market, after fair and reasonable efforts have been made to find a purchaser who will give the highest price for it.

Winnipiseogee Lake Co. *vs.* Town of Gilford, 67 N. H., 514; 35 Atl., 945, 946.

Market value is the price at which the owner of goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such price as dealers in the goods are willing to receive, and the purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade.

Cliquot's Champagne, 3 Wall., 135, 142.
Muser *vs.* Magone, 155 U. S., 240, 249.

The selling price of lands was established in various ways aside from the long lists of sales compiled by Mr. Holcomb and Mr. Scribner. But if there had been no other proof than said lists, we submit that, for purposes of the application for temporary injunction, the proof would have been plenary and persuasive, if not conclusive. When we consider that these lists comprise all of the recorded sales of land between January 1, 1909, and June 5, 1913, evidenced by warranty deeds, and from which it was possible at all to determine the amount of the consideration; when we further consider that great numbers of them were made in the year 1912, to which the assessment under examination relates; and when we further consider that in the instance of each individual transaction the assesed valuation bore about the same relation to the stated consideration—to wit, somewhat less than 20 per cent—as in all the other cases, thus establishing regularity and continuity, and when we further consider the verification of these transfers, in large numbers and in instances taken at random, the result in each case being to confirm the correctness of the consideration stated in the deed, we submit that the evidence is entitled to the utmost weight.

Defendants, at page 78 of their brief, say that "these so-called verifications were the merest shams." There is no justification for this statement, either in the record or in defendants' brief. As pointed out in our former brief, verifications resulted not only from the investigation of Mr. Holcomb, but in various other ways; but if we deal only with

Mr. Holcomb's investigations and verifications, it is plain, from a consideration of his testimony upon this subject (Rec., pp. 273, 279, 280), and the conclusion is irresistible, that they were carefully made and fully sustain the accuracy of the entire lists. The investigator went in each instance to the grantor, the grantee, the agent who conducted the transaction, or someone else having first-hand knowledge, obtained from them the information, and testified as to the result. Possibly this might have been objected to as hearsay if the case had been upon final hearing, but no such objection was made, and the testimony is wholly undisputed. Even if the objection had been made and the case had been upon final hearing, there is the best authority for holding that it would have been unavailing.

In *Cliquot's Champagne*, 3 Wall., 114, 141, the Supreme Court, speaking of a like objection to similar testimony upon a question of market value, said:

> "In *Lush vs. Druse* (4 Wendell, 315), the proof upon the trial, in the court below, was as follows: 'A witness proved the value of wheat in Albany, in 1822, '23, '24, and '25, derived by him from the books of large dealers in wheat, at that place, he knowing nothing of the price of his own knowledge.' The court said: 'The proof was by a witness who had inquired of merchants dealing in the article, and examined their books. This, uncontradicted, was sufficient.' With this ruling we are satisfied. While courts, in the administration of the law of evidence, should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy—itself a serious evil—without giving an additional safeguard to the interests of justice. We think the Price-Current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness,

> both of which were admissible upon the authority of the case referred to in Wendell. It was clearly relevant."

Defendants oppose this proof (appellees' brief, pp. 88-94) with a long quotation from the opinion in *People vs. McCarthy*, 8 N. E., 85; 102 N. Y., 631. But this authority is readily distinguishable. In the first place, all that was said by that learned court upon the point here presented by defendants was *obiter dictum*. The case is entirely disposed of in the first paragraph of the opinion, the court holding (102 N. Y., 635; 8 N. E., 86) that it has no jurisdiction of the appeal, which is accordingly ordered dismissed. The observations which follow, while interesting, are not authoritative. Not only this, but, so far as the opinion shows, the rule of assessment in New York is not market value, as in Colorado, but intrinsic value. Moreover, the court is applying the rule, peculiar to New York, that in determining the value of lands evidence of sales is not admissible, the proper and only evidence being the opinion of experts. This is not the rule in Colorado, or elsewhere.

Loloff *vs.* Sterling, 31 Colo., 102, 106.

But, notwithstanding the New York rule, the court concedes the admissibility of the evidence, at least before the State Board of Equalization, saying (102 N. Y., 638; 8. N. E., 87):

> "There would seem to be no reasonable objection to the reception and consideration by the State board of the information furnished to them by the relator, to be accorded such weight and influence as they might deem it entitled to; and we have no reason to suppose that this consideration was not given to it; but we think the relator has ascribed to the information offered an importance altogether disproportionate to its real value when it is claimed that should be regarded as decisive evidence upon questions of value."

And the reason for this suggestion is manifest when we consider the nature of the proof offered in the New York case and compare it with that here involved. In the New York case the question was between assessments made in the City and New York and the assessments made elsewhere throughout the entire State. There was no evidence that either in the City of New York or in the State the investigators had taken all of the deeds; there was no evidence that those which they took were warranty deeds, and there was no evidence of verification of any of them in any way. On the contrary, the evidence was that out of the almost inexhaustible supply of deeds in the city of New York, and in the State outside of the city, only a few had been selected for purposes of comparison. Moreover, even the few so selected showed no regularity in the ratio between assessed valuations and stated considerations. Upon this point the court says (102 N. Y., 637; 8 N. E., 87):

> "These instances of sales were selected from an almost inexhaustible number by the agents of the relators, and show great disparity in the proportions existing between their several assessed valuations and the prices inserted as the consideration in their respective deeds. A large number of instances appear where the assessed valuations are much larger than the prices apparently obtained for the land, reaching occasionally three and four times the amount specified in the deeds; and, on the other hand, still greater disparity is shown between the prices reported in many instances and the assessed valuations,—in some instances the price reported reaching six times the amount of the assessment. It is thus quite apparent that a partial or even careless process of selection would seriously affect the weight of such statements as evidence, and render them particularly objectionable when made by a party interested in producing a particular result."

But in the case at bar no such objections are tenable, the lists of transfers, hundreds in number (Rec., pp. 53-63, 78-

95), showing the greatest regularity in the relation between assessed valuation and stated consideration, the assessed valuation in each instance being not more than 20 per cent of the consideration, and the other objections mentioned by the New York court, and going to the weight of the evidence, being entirely absent.

Defendants conclude upon this branch of the discussion (appellees' brief, pp. 94 *et seq.*) by attacking the testimony of D. A. Camfield and T. C. Henry (Rec., pp. 242 *et seq.*, 388 *et seq.*). The record itself is a sufficient answer to these criticisms. Both Mr. Camfield and Mr. Henry are experts of the highest standing in the field concerning which they assumed to testify.

We therefore submit that, even upon the particular branch of the case to which defendants have chosen to confine themselves—to wit, land values—their attack has signally failed. Inasmuch as the numerous other elements which support plaintiff's contention have not been questioned at all, we submit with confidence that the evidence justifies and requires the conclusion that the property locally assessed in Weld County was for purposes of assessment valued at not to exceed 20 per cent of actual value.

IV.

DEFENDANTS' CONTENTION THAT RAILROAD PROPERTY WAS UNDERASSESSED. (Appellees' Brief, Pages 112-168.)

This subject is fully discussed in our former brief, at pages 193-212. What was there said anticipates and constitutes a sufficient answer to the contentions now made by defendants. At this point, therefore, we content ourselves with pointing out a few of the misapprehensions with which defendants are beset and the misstatements which they make. Whether these misstatements are to be attributed to inadvertence or

poetic license we are at a loss to say. In either event they are misleading and prejudicial.

The fundamental error in defendants' argument lies in the claim that the taxing authorities of Colorado were required to take, for purposes of taxation in that State, a portion of the total value of the corporate plant, wherever situate, based upon the relation between the mileage in Colorado and the total mileage, wherever situate. That the statutes of Colorado make no such requirement, and that, if they did, they would be unconstitutional, is demonstrated in our former brief (pp. 199-212). Following their erroneous theory, defendants assert (their brief, p. 116) that the total value of the corporate plant, wherever situate, is to be determined by one or the other, or both, of two methods, which they denominate the stock-and-bond method and the earnings method.

It is claimed that, having ascertained the value of the entire corporate plant, wherever situate, either upon the basis of the average market value of its stocks and bonds, or by capitalization of the earnings of the entire system, the rest of the process is a mere matter of mathematics, and that portion of the property in Colorado is to be valued for taxation by a simple computation in division and multiplication, and not by the exercise of any judgment whatsoever as to the actual value of that portion of the property within said State. Defendants say that if this process had been followed in the case of the Union Pacific in the year 1912, values would have been taxed in Colorado approximately 33⅓ per cent greater in the aggregate than those which were actually subjected to Colorado taxation. But if this be true, it is of no importance, for if those parts of the entire corporate plant outside of Colorado had exceptional value, so that the distribution of these values equally over the entire mileage would not in reality represent the average value per mile of the property in Colorado, it is obvious that such a method of assessment could not be upheld; for, as the Circuit Court of Appeals said

in respect to the same Colorado statute here under consideration:

> "Evidence of the value of property not necessary for railroad purposes, and that parts of the corporate plant of a railroad company, including its various terminals, are of exceptional value, is competent, and when offered must be given effect by the assessing board and by the court in ascertaining the value of its corporate plant in the State."
>
> A., T. & S. F. *vs.* Sullivan, 173 Fed., 456, 458 (8th syllabus).

Such claim was made and sustained by evidence before the State Tax Commission. It was especially set up in the statement filed with the commission (Rec., pp. 107, 168), considered by the commission and given effect, and, in view of the testimony offered and produced, and the finding of the commission, is conclusive. It was likewise testified to in the lower court by Mr. Scribner (Rec., pp. 216, 217) and by Mr. Stebbins (Rec., pp. 193, 201, 202).

But defendants attack the correctness of the statement filed by the railroad company with the Tax Commission, claiming that it was false and misleading in many particulars. An analysis of these charges will demonstrate that they are without foundation. The statement itself was under oath (Rec., p. 169). The method of its preparation and the care exercised to make it accurate are testified to by Mr. Scribner, the tax commissioner (Rec., pp. 202-206, 206-209). The State Tax Commission made its own independent investigation, checked over the record, and Dr. Phillips, a member of the board, testified that they failed to find any property omitted and discovered no attempt whatever to mislead or misrepresent (Rec., p. 234). But even if the report had been filled with misrepresentations and inaccuracies, the assessment would not have been invalid, because the board did not accept the report, but investigated for themselves, wholly independent of the report, every fact upon which their assessment was based, and reached their

conclusions upon findings of their own resulting from original investigation.

But defendants have failed to show that the report was erroneous in any particular, and have equally failed to point out any impropriety in the action of the State Tax Commission. It is claimed (appellees' brief, pp. 112, 118, 125) that the mileage of the system which was to be taken for a divisor in ascertaining Colorado's proportion of the value of the entire corporate plant should have been 6,678.29 miles, whereas some larger number was taken. But the figure mentioned by defendants was the average mileage of the system for the fiscal year ending June 30, 1911 (Rec., p. 168); whereas the statute requires that in ascertaining Colorado's proportion of the value of the entire corporate plant upon a mileage basis, for the purpose of taking it into consideration in determining the assessable value of the property in Colorado, "the board shall then ascertain and determine the total number of miles of railway track, telephone and telegraph lines of said company, wherever situate, and the total of such mileage in this State." (Rev. Stats. 1908, sec. 5653.) This information is to be given as of the December 31 preceding, and it is expressly provided "that any lines upon which trains are operated regularly shall be considered as a main track and assessed accordingly." (Rev. Stats. 1908, sec. 5642.) It follows that the average mileage of the system for a period of twelve months terminating six months before the date fixed by the statute, is certainly not the mileage to be taken for this purpose. The statement which the railroad filed with the commission showed that on December 31, 1911, the miles of first main track of the system were 7,084.52, and of second main track 751.54; whereas in Colorado the miles of first main track were 583.20, and of second main track 5.50 (Rec., pp. 107, 114, 115); and the testimony of Mr. Scribner (Rec., pp. 225, 392) showed, without dispute, that in December, 1911, the mileage of first main track of the system was 7,2[illegible]68, and the average for the six months from July to December,

1911, 7,072.81 miles; from which it would plainly appear that the mileage was understated rather than overstated in the company's report, and that the commission was justified and required to take a divisor larger than 6,678.29. Moreover, upon this question of mileage, the members of the commission testified that they made independent investigation of their own from original sources of information, and reached their own conclusion, without regard to the railroad company's report. (See testimony of Link (Rec., pp. 254, 256-258), Phillips (Rec., pp. 233, 234, 239), and Adams (Rec., pp. 263, 264).)

The record does not disclose just what divisor the commissioners used, but they would have been fully justified in using a divisor equal to the sum of the mileage of both the first and second main track, aggregating approximately 7,900, because the statute quoted above expressly provides "that any lines upon which trains are operated regularly shall be considered as a main track and assessed accordingly," and wherever double track exists, both lines thereof are regularly operated in accordance with fixed schedules.

Next it is asserted that the dividend to which the divisor was applied was made too low, because the market value of Union Pacific stocks was erroneously reported to the commission (appellees' brief, pp. 119, 121, 123). Mr. Scribner, the tax commissioner, says (Rec., p. 203) that the average market value inserted by him in the report was obtained from publications regularly issued by stock-brokerage houses, according to a method approved by the State Board of Equalization and State Tax Commission, and that it is approximately correct. In opposition to this, defendants offered the testimony of one witness, a clerk in a brokerage office, who, by certain computations, to which he testified (Rec., pp. 380, 381), obtained an average slightly higher than that reported by Mr. Scribner. He admitted, however (Rec., p. 381), that his method was not accurate and did not actually show the real average market value for the year. This is the sole foundation for defendants' repeated

criticism upon this point. But even if it had been shown that the statement in the railroad company's report was inaccurate (which it was not), the validity of the assessment would not have been affected, for the members of the commission all testified that they made their own independent investigation of the average market prices of the Union Pacific securities, all of which are, of course, listed upon the exchanges, and from such investigation came to their own conclusions and made their own findings. (See testimony of Phillips (Rec., pp. 234, 240), Link (Rec., pp. 254, 257, 260), and Adams (Rec., p. 264).) Such findings are, of course, conclusive.

It is next asserted by defendants (their brief, pp. 119, 124, 125) that the dividend to which the mileage divisor was applied was wrongfully reduced by making erroneous deductions therefrom on account of property not directly connected with the operations of the corporate plant. The language of the statute respecting such deduction is:

> "That the State Board of Equalization (now Tax Commission), in assessing the property of corporations whose lines and property extend into other states and territories, shall have power to make such deductions of property of such corporations in other states, not connected directly with the operation of the corporate business, as may be just, to the end that the fair proportion of such corporate property in this state may be ascertained."
>
> Rev. Stats. 1908, sec. 5653.

The deductions claimed on this account were set forth in the railroad company's report to the commission (Rec., pp. 107, 108). They are fully explained in the testimony of Mr. Scribner (Rec., pp. 204, 222, 228, 231). The specific deductions attacked are: first, that on account of water-line properties; second, that on account of cash and demand loans and time deposits; and, third, that on account of cash advanced for construction of new lines and steamships. As to

the water-line properties, it appears from Mr. Scribner's testimony that these are certain ships, and the docks at which they land, belonging to the O. R. & N., which are not a part of the railroad mileage. They are not used in connection with the railroads of the system, except as, incidentally, passengers and freight passing over the railroads may proceed on their journey by taking these boats. But this is also true as to passengers and freight not carried upon the railroads of the system. They are, in fact, a separate enterprise. The mileage traveled by these boats cannot be taken into consideration in determining the average value per mile of the railroad plant, and therefore, the value of the water-lines property cannot be added to the value of the railroad plant.

The cash items, constituting the other two classes of deductions criticised by defendants, are explained by Mr. Scribner as items of cash held in the New York office, and not in any manner connected with the transportation system. It seems too clear for argument that such items as these are not to be included in the value of the transportation unit. Whether treasury assets are held as cash items or held as investment stocks and securities, it is obvious that they constitute no part of the transportation machine. They are locally assessable in the state where they have their situs. It is intimated (appellees' brief, pp. 120, 125) that because the evidence did not show that taxes had been paid upon these items in New York, therefore they were taxable in Colorado; but this is a complete *non sequitur*. It is equally true that the evidence did not show that these items of property had not been taxed in New York. But whether they had or had not paid the taxes to which they were legally subject is a matter of no moment here. They were not within the jurisdiction of the taxing authorities of Colorado, and could not be assessed by them in any event.

Carlisle *vs.* Pullman Co., 8 Colo., 320.

Burlington, etc., Co. *vs.* Lancaster County, 18 N. W., 71; 15 Neb., 251.

But in this matter of deductions, as in the other matters referred to above, the Colorado Tax Commissioners did not accept without question the railroad company's report. They made their own independent investigation and rejected some of the claims for deduction made by the railroad company. (See testimony of Link (Rec., p. 257).) Nothing has been shown to invalidate or affect their finding in this regard, and it must be held to be conclusive.

In the matter of capitalization of earnings, it is asserted that the rate of income to which railroad investments of this character should be entitled is 6, and not 8, per cent (appellees' brief, pp. 117, 120, 127). No authorities are cited. None need be cited by us to convince this court that a rate of return of 8 per cent per annum upon capital invested in western railroad enterprises is, to say the least, not excessive, and has been uniformly upheld by the decisions of the courts, including a large number of decisions by the Federal courts of this circuit. Moreover, while it appears that the State Tax Commissioners did capitalize Colorado earnings at the rate of 8 per cent, they did so without any deduction from net revenue of taxes paid. The action of the commissioners in this regard is fully explained by Dr. Phillips (Rec., p. 241). After deducting taxes from net income, the result was only slightly in excess of 6 per cent upon the actual value found by the State Tax Commission for the property within the State of Colorado (Rec., p. 216).

But defendants (pp. 121, 128 of their brief) severely criticise the plaintiff because it reported to the Tax Commission, and the Tax Commission because it considered, the net earnings of Colorado mileage. It is asserted that this is an unheard-of procedure and contrary to the statute. But, as we pointed out in our former brief, the result sought and required by the Colorado Constitution and statutes is a determination by the State Tax Commission, in the exercise of their judgment as public officers, of the value of that portion of the railroad company's property lying within said state. The statutes empower the commission to take into consider-

ation any and all facts which may have bearing and exert influence upon the determination of said question. To aid the commission in its investigation, the statute (Rev. Stats. 1908, sec. 5642) requires each railroad company to file annually a statement under oath, containing certain specific information, therein described with particularity, and concluding as follows:

> "The total gross earnings, as well as the net earnings, of such corporation during the year for which the assessment is made, and the total amount expended in the operation and maintenance of the property and the improvement thereof, distinguishing that * * * *and such further information as the state board of equalization may in writing require.*"

Acting within the authornty conferred by this statute, the State Tax Commission, and its predecessor the State Board of Equalization, have promulagted certain forms for said statement or return, which the railroad companies are required to fill out and file. The return made by the Union Pacific in the year 1912, which appears in the record at pages 109-169, is upon and in accordance with the required form, and the information therein contained is that, and only that, which the State Board of Equalization (now the State Tax Commission) has in writing required. The forms for the various schedules making up this report are prepared and printed by the Tax Commission, and by it sent to the various railroad companies with directions to fill out and return the same. The statement (Schedule 16A, Rec., p. 168) in respect to gross and net earnings, both upon the system and upon the mileage in Colorado, was therefore required by the commission, acting within its statutory authority, and furnished by the company pursuant to said requirement (Rec., pp. 209, 218, 219). Surely such conduct should not be the subject of criticism. Not only this, but it is clearly contemplated by the statute that the commission should take

this matter into consideration, together with other matters, in determining the value of the property within the State. Defendants' criticism of such action is therefore wholly unjustified.

But defendants say it was wholly impossible to segregate Colorado earnings from system earnings, and the figures given are unreliable. Such an assertion is in direct conflict with the testimony. Mr. Stebbins, an auditor of the Union Pacific, testified (Rec., p. 194) that as to intrastate business the matter was obviously simple, and that as to interstate business the apportionment was made in accordance with a formula prescribed by the various State railroad commissions, including the State Railroad Commission of Colorado, and approved, recognized, and recommended by the National Association of State Railroad Commissioners, the distribution being made on a mileage basis as to each passenger and each parcel of freight conveyed. This being a method approved by the National Association of State Railroad Commissioners, prescribed for the use of the Union Pacific, not only by the State Tax Commission of Colorado, but also by the commissions of Iowa, Nebraska, and Kansas (Rec., p. 202), being a method in common use, and based upon a principle of distribution which certainly ought to give fair and accurate results, we submit that its criticism by defendants is unjustified, particularly as the results have not been shown to be incorrect.

Defendants complain because the value of the entire corporate plant, wherever situate, was not ascertained by a capitalization of the net income of the entire system at the rate of 6 per cent per annum, and the assignment to Colorado of that portion of the whole value so ascertained determined by the ratio between Colorado mileage and total mileage. But it is shown without dispute (Rec., p. 168) that the average net earnings per mile for the entire system were $5,866.06, and the average net earnings per mile for Colorado were $2,904.63, including all business, both interstate and intrastate. The earning capacity of a mile of road in Colorado

was less than one-half that of the average mile for the entire system, including Colorado. It also appears (Rec., p. 107) that while there are 751.54 miles of double-track railroad on the entire system, there are in Colorado only 5.50 of such miles, so that of the total, 746 miles thereof are in States outside of Colorado. It also appears that the density of the rolling-stock—to wit, the amount of rolling-stock per mile necessarily permanently situated outside of the State of Colorado, on account of the heavier traffic there done—is much greater than the rolling-stock within said State (Rec., p. 216). And it also appears that, with the exception of about eight miles in the vicinity of Julesburg, Colorado, where the main line of the Union Pacific dips into that State, all of the Union Pacific lines in Colorado are branch lines. The enormous tonnage carried by the Union Pacific—the business which renders its property valuable and gives to the average mileage of its system the earning capacity mentioned above—is transcontinental in its character, passing over the main line above mentioned, neither originating nor terminating in Colorado, having no relation whatsoever to the lines in that State, and not adding in the slightest degree to their value. These facts the State Tax Commission was required to take into consideration. They indicated and established exceptional values attaching to the parts of the corporate plant outside of the State of Colorado and not attaching to that portion within said State. They were considered by the commission, as all the members thereof testified, and as a result that commission arrived at a valuation of the property of the Union Pacific within that State which they all stated was not less than its full actual value, and took one-third thereof for purposes of assessment. And the members of the commission further testified that if they had done otherwise, and had applied the rigid rule of apportionment now contended for by defendants, the result would certainly have been to import values into the State, and would have given a result exceeding the actual and true value of the property of the company therein situated. (Rec., pp. 234, 254, 257,

258, 259, 262, 263, 264.) Their finding in this regard having been made pursuant to their statutory duty and authority, it is certainly unassailable and conclusive. There is absolutely no justification for the statement, made at page 167 of defendants' brief, that in respect to this assessment the Colorado Tax Commission was guilty of "flagrant and wanton disregard" of duty. On the contrary, the evidence established beyond question a conscientious, careful, and painstaking effort on the part of that commission to arrive at a just assessment, and in no respect has its propriety been successfully attacked.

There is absolutely no justification for the statement, made at page 121 of defendants' brief, that the statutes of Colorado "were ignored and avoided by the tax commission, according to the sworn testimony of Mr. Link." On the contrary, the testimony establishes without contradiction that the statutes of the State of Colorado, as correctly construed and always understood and administered, were in every respect fully obeyed; and the testimony of Mr. Link was simply to the effect that the board undertook to ascertain the value of the property within the State of Colorado, taking into consideration as one element Colorado's proportion upon a mileage basis of the value of the entire corporate plant, but not accepting that as the absolute, final, and only guide of assessment; that in so doing they all believed that they were following the statute and, as a matter of fact, they were. As Mr. Link says (Rec., p. 262):

> "If we had followed the statute strictly, it being held that the unit value of an entire system and equal distribution regardless of business and population is fair, I presume the assessment would have been fair, but my judgment is it would have caused the importation of values outside of the State."

Without pursuing the subject further, we respectfully conclude, as before, and notwithstanding the very forceful brief of defendants, that the finding as to value and the assess-

ment of the property of the Union Pacific made by the State Tax Commission are entitled to full faith and credit, and represent a valuation at least as great as 33 1/3 per cent of the actual value.

V.

DEFENDANTS' CONTENTION THAT DENIAL OF THE INJUNCTION WAS NOT AN ABUSE OF DISCRETION, AND THEREFORE SHOULD NOT BE REVERSED. (Appellees' Brief, Pages 171-176.)

The rules which should have controlled the court's decision upon the application for injunction, and the reasons why, as we respectfully, but earnestly, contend the court below erred in denying said application, are set forth at pages 279-291 of our former brief. The principles stated and the authorities cited in those portions of our brief are, we submit, in no way met, shaken, modified, distinguished, or overcome by what is set forth in defendants' brief. We shall not extend the present brief by further discussing this branch of the case.

Respectfully submitted,

N. H. LOOMIS,
C. C. DORSEY,
Solicitors for Appellant and Petitioner.

UNION PACIFIC RAILROAD COMPANY *v.* BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WELD, STATE OF COLORADO, ET AL.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 22. Argued November 15, 1916.—Decided June 3, 1918.

An appeal does not lie to this court from an order of the Circuit Court of Appeals which merely affirms, on interlocutory appeal, an order of the District Court refusing a preliminary injunction, even where the decisions below were rested on the ground of adequate legal remedy, which might have been made the basis for a final dismissal of the bill.

A certiorari may issue under Jud. Code, § 262, to review an interlocutory judgment of the Circuit Court of Appeals which, because the case is of a kind ultimately appealable, is not subject to certiorari under § 240.

Decision of an application for certiorari having been postponed to the hearing of the appeal which was also taken, and the appeal being found without jurisdiction, the certiorari, in this case, is granted and the record on appeal is treated as the return to the writ.

Equity has jurisdiction to enjoin the collection of illegally discriminatory taxes, where the existence of an adequate and complete remedy at law is doubtful.

Where the legal remedy by paying the taxes and suing to recover back necessitates separate actions against several school districts and towns, it will not displace the equitable remedy by injunction in one suit.

Section 5750, Colorado Rev. Stats., 1908, provided a plain, adequate and complete legal remedy in cases of illegal taxes by requiring the Board of County Commissioners to refund them when paid and by conferring impliedly on the taxpayer a right to recover them though levied for state, school district and town, as well as for county, purposes by one action against the Board; but, in view of later provisions of Laws, 1913, c. 134, § 5, the effect of which has not been determined by the state supreme court and which might be construed as

prohibiting the Board from refunding without the approval of the State Tax Commission and as withdrawing the right of action against the Board where the Commission disapproves, *held*, that the existence of an adequate legal remedy is so uncertain and debatable that jurisdiction in a suit for an injunction could not properly be declined.

217 Fed. Rep. 540; 222 *id.* 651, reversed.

THE case is stated in the opinion.

Mr. C. C. Dorsey, with whom *Mr. N. H. Loomis* was on the briefs, for appellant and petitioner.

Mr. Charles F. Tew for appellees and respondents.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

This is a suit by the Union Pacific Railroad Company to enjoin the collection of a portion of the taxes levied on its property in Weld County, Colorado, in a particular year, the gravamen of the complaint being that the company's property was assessed at one-third of its value, while most of the other property was assessed at one-fifth and some not at all, and that this operated to place an undue burden of taxation on the company contrary to the constitution and laws of the State and to the due process and equal protection clauses of the Fourteenth Amendment. A portion of the taxes was conceded to be valid and was paid. The portion in dispute amounts to $31,127.37. An application for a temporary injunction, submitted on affidavits and other proofs, was denied by the District Court, and that interlocutory order was affirmed by the Circuit Court of Appeals, 217 Fed. Rep. 540; 222 Fed. Rep. 651, both courts being of opinion that relief by injunction was not admissible because there was a plain, adequate and complete remedy at law. While that

view might have resulted in a final decree dismissing the bill, such a decree was neither entered in the District Court nor directed by the Circuit Court of Appeals. In other words, an amendment of the bill and further proceedings were not precluded.

An appeal to this court from the affirmance of the District Court's interlocutory order was allowed, but the appeal is without statutory sanction and must be dismissed. Anticipating that this might be so, the company presented a petition for a writ of certiorari under § 262 of the Judicial Code (see *McClellan* v. *Carland*, 217 U. S. 268; *United States* v. *Beatty*, 232 U. S. 463, 467; *Meeker* v. *Lehigh Valley R. R. Co.*, 234 U. S. 749), consideration of which was postponed to the hearing on the appeal. We now grant the petition and treat the record on the appeal as the return to the writ. See *Farrell* v. *O'Brien*, 199 U. S. 89, 101; *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 8.

For many years the revenue laws of Colorado have contained a section[1] imposing on the board of county commissioners "in all cases" the duty of refunding to the taxpayer "without abatement or discount" "any tax, interest or costs, or any portion thereof," which is found to have been "erroneous or illegal", and by a necessary implication conferring on him a correlative and substantive right to have the same so refunded. Laws 1870, p. 123, § 106; 2 Mills Ann. Stats., § 6463; Laws 1902, c. 3, § 202; Rev. Stats. 1908, § 5750; *Price* v. *Kramer*, 4 Colorado, 546, 555; *Woodward* v. *Ellsworth*, 4 Colorado, 580, 581; *Hallett* v. *Arapahoe County*, 40 Colorado, 308, 318; *Bent County* v. *Atchison, Topeka & Santa Fe Ry. Co.*,

[1] ". . . and in all cases where any person shall pay any tax, interest or costs, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

52 Colorado, 609, 612–614. If that section is still in force, unqualified and unmodified, the conclusion below that in this case there is a plain, adequate and complete remedy at law, and therefore that relief by injunction is not admissible, is fully sustained by our decisions. *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481, and cases there cited; *Pittsburg, etc., Ry. Co.* v. *Board of Public Works*, 172 U. S. 32; *Arkansas Building & Loan Assn.* v. *Madden*, 175 U. S. 269; *Raymond* v. *Chicago Union Traction Co.*, 207 U. S. 20, 38; *Johnson* v. *Wells, Fargo & Co.*, 239 U. S. 234, 243; *Greene* v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 519.

That the taxes were levied for state, school district and town, as well as for county, purposes is not material; for it is apparent from the Colorado statutes and decisions that the section covers broadly the whole of the tax that is found to have been erroneous or illegal, regardless of the purpose for which it was levied and placed on the county tax roll. And it also is immaterial that the taxes were made a lien on the company's real property, for the lien would be effectually removed by paying them and suing to recover back the money. *Allen* v. *Pullman's Palace Car Co.*, 139 U. S. 658, 661; *Arkansas Building & Loan Assn.* v. *Madden*, *supra*, 273.

Whether the section named is still in force, unqualified and unmodified, is the important question. If not in force, a single action at law would not suffice, for then it would be necessary to bring a separate action against each of several school districts and towns for its part of the tax. See *Raymond* v. *Chicago Union Traction Co.*, *supra*, pp. 39–40. And if the section has been so qualified and modified that the continued existence of the right originally conferred on the taxpayer is involved in uncertainty, an essential element of the requisite remedy at law is wanting; for as this court has said, "It is a settled principle of equity jurisprudence that, if the remedy at

law be doubtful, a court of equity will not decline cognizance of the suit. . . . Where equity can give relief plaintiff ought not to be compelled to speculate upon the chance of his obtaining relief at law." *Davis* v. *Wakelee*, 156 U. S. 680, 688.

In 1911 Colorado established a state tax commission and conferred on it extensive supervisory powers over the administration of the revenue laws of the State, including the acts of assessors and boards of county commissioners. Laws 1911, c. 216. And in 1913, before the present suit was begun, the State adopted a statute extending the powers of the commission and repealing "all acts or parts of acts in conflict" therewith. Laws 1913, c. 134. The fifth section of that act says:

"No abatement, rebate or refund of taxes shall be allowed by the county commissioners, unless a hearing shall be had thereon and a notice of such hearing and an opportunity to be present being [be] first given to the assessor, and in case any abatement, rebate or refund of taxes shall be recommended by said county commissioners, they shall certify to the Colorado Tax Commission their findings, giving the amount of such abatement, rebate or refund, and their reasons therefor, and such abatement, rebate or refund shall become effective upon the endorsement thereon of the approval of the Colorado Tax Commission and in case the said Colorado Tax Commission shall disapprove the recommendations of the county commissioners, they shall endorse their disapproval thereon and return it to the county commissioners with a statement of their reasons therefor and no abatement, rebate or refund of taxes shall be allowed by the said board of county commissioners if the application is disapproved by the said Colorado Tax Commission."

Counsel differ widely respecting the effect of this statute on the earlier section (§ 5750, Rev. Stats. 1908) and on the substantive right given by it to have an erroneous

or illegal tax refunded. On the one hand it is said that neither the earlier section nor the right thereby conferred is in any wise affected, and that one paying an erroneous or illegal tax still may call on the county board to refund it and, if the application be refused, has a right of action to compel the board to refund. On the other hand, it is said that the new statute qualifies and modifies the earlier section by restricting the power and duty of the county board to refund to instances in which the state tax commission approves the application, and that the correlative right of the taxpayer under the earlier section—the right impliedly arising out of the duty imposed on the county board—is qualified and modified accordingly; in other words, that the new statute prohibits any refunding of taxes by the county board save in instances having the approval of the state commission and that in other instances it operates to withdraw from the taxpayer all right of action against the county board under the earlier section.

An examination of the new statute shows that the controversy just outlined is not without some real basis and that its solution is not free from difficulty. The question is purely one of state law, and, so far as we are advised, the Supreme Court of the State has not passed on or considered it. A ruling by us on the question would neither settle it for that court nor be binding in an action to recover the tax if paid. In these circumstances it cannot be said that the company certainly or plainly has an adequate and complete remedy at law. On the contrary, the existence of such a remedy is debatable and uncertain. And this being so, the situation is not one in which cognizance of the present suit properly can be declined.

With the question of equitable jurisdiction out of the way, the District Court should dispose of the application for a temporary injunction on the merits and otherwise proceed with the suit in regular course. The controverted questions of fact arising on that application have not been

considered by us and we intimate no opinion respecting them. Such questions are rarely, if ever, regarded as properly subject to examination here on writ of certiorari.

Appeal dismissed; certiorari granted, record on appeal to stand as return to writ; decrees below reversed and cause remanded to the District Court for further proceedings in conformity with this opinion.